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# 155

CASES DETERMINED

IN THE

# SUPREME COURT

OF

# WISCONSIN

OCTOBER 28, 1913 — FEBRUARY 3, 1914

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# JUSTICES

OF THE

# SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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JOHN B. WINSLOW
*Ex officio* CHIEF JUSTICE
ROUJET D. MARSHALL
ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES
AAD J. VINJE

---

*Attorney General* - - WALTER C. OWEN

*Clerk* - - - CLARENCE KELLOGG

## MEMORANDUM.

Mr. Justice SIEBECKER took no part in the decision of the cases reported in this volume except the cases of *Brunner v. Minneapolis, St. P. & S. S. M. R. Co.* (page 253) and *Vicker v. Byrne* (page 281).

## ERRATA IN THIS VOLUME.

Page 372, line 24. Omit the word "not."
Page 403, last line. For sec. 925—308, read sec. 925*m*—308.
Page 404, line 21. Same correction.
Page 417, line 1. For *Crams*, read *Grams*.

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# IN MEMORIAM.

## COLONEL GEORGE W. BIRD.

On the 13th day of January, 1914, Mr. John M. Olin of Madison addressed the court:

*May it please the Court:*—The committee appointed by the Dane County Bar Association for that purpose herewith presents to the court a brief memorial of the life and services of the late Colonel GEORGE W. BIRD, whose death occurred in this city on the morning of October 12, 1912. We pray that the same may be made a part of the permanent records of the court.

*Memorial of the Dane County Bar Association.*

Colonel GEORGE W. BIRD was born in the city of Milwaukee on July 28, 1837, the son of Augustus A. and Charity (Le Claire) Bird. In the spring of 1838, following the birth of Colonel BIRD, his father came to Madison with a crew of men to build the capitol building of the new territory. The father was the first sheriff of Dane county, the second mayor of Madison, and the builder of most of its early and more important public buildings, including the capitol, courthouse, south hall of the University, etc. It was in this city that Colonel BIRD was reared to manhood, his life being practically contemporary with the life and existence of the city. It was in its public schools that he fitted himself for college. He entered the University in the fall of 1856, and graduated in the class of 1860, having taken the ancient classical course. He was not only proficient in the prescribed work of the University, but very prominent in its literary and debating societies.

Upon his graduation he entered, on July 5, 1860, as a student, the law offices of Smith, Keyes & Gay, one of the leading law firms of the state, and after two years of study was admitted to the bar of the circuit court for Dane county, then presided over by Judge HARLOW S. ORTON, later a member, and for a number of years Chief Justice, of the Supreme Court.

Acting upon the advice of Judge ORTON, he located in the practice of his profession at Jefferson, Jefferson county, in this state, in the fall of 1863. But in May, 1864, while practicing at Jefferson, he received a telegram from his friend, afterwards United States senator, John C. Spooner, that a University company was being

formed for the Civil War, and he answered by enlisting in Company B, Fortieth Wisconsin Volunteer Infantry. He was second lieutenant of that company, and Senator Spooner was corporal. Upon being discharged from the service, after an entirely creditable army record, he returned to Jefferson and resumed the practice of his profession.

In 1866 he formed a partnership with his uncle, Judge Ira W. Bird, that was to continue for nearly a quarter of a century; but during the period from 1866 to 1876 Colonel BIRD combined with the practice of the law the work of county superintendent of schools for Jefferson county. This work gave him a large and favorable acquaintance throughout the county, and in later years the experience in this field of labor was to him a source of great satisfaction.

During the years 1874–1876 Colonel BIRD held the office of secretary to Governor William R. Taylor, and that of military secretary of the Wisconsin National Guard, these positions having come to him unsolicited and at the suggestion of George B. Smith, in whose office he had spent two years as student and clerk.

The law partnership of Colonel BIRD with his uncle, Judge Bird, continued at Jefferson, under the firm name of I. W. & G. W. Bird, until April 1, 1886. In 1886 Colonel BIRD and his family moved to Madison, that his children might avail themselves of the better educational advantages and that he might broaden somewhat the field of his legal practice. On his coming to Madison, the law firm of Gregory, Bird & Gregory was formed, consisting of J. C. Gregory, Colonel BIRD, and Charles Noble Gregory. This partnership expired by limitation in October, 1889. From that date Colonel BIRD practiced alone, until the graduation of his son, Hobart S. Bird, from the law school of the University in 1896, when a partnership of father and son was formed, which continued until October 1, 1897, and was then succeeded by the firm of Bird, Rogers & Bird. Hobart S. Bird, who is now a successful lawyer in New York city, retired from the firm in 1898, and on July 1st of that year the firm became Bird, Rogers & Elver, which firm terminated August 12, 1902. Shortly after this date Mr. Stephen W. Gilman became associated with Colonel BIRD under the firm name of Bird & Gilman, which partnership continued until July 1, 1908. Colonel BIRD'S final partnership relation was as the head of the firm of Bird, Harper & Reynolds. On January 1, 1910, he retired from a long and honorable practice of his profession in the seventy-third year of his age.

Colonel BIRD was well known, not only in the courts of this and adjoining states, but in the different courts of the United States, as an able, honorable, and successful lawyer. The Wisconsin Reports covering a period of over forty years and including over one

hundred volumes testify to the extent, variety, and importance of the litigation that was intrusted to him. Possessed of an analytical and logical mind and gifted with the capacity for intense and continued application, he was not long in acquiring a thorough knowledge of fundamental legal principles and in establishing himself as a very skilful and successful practitioner both before court and jury. He did not have to wait many years before his services were sought, on one side or the other, in all the more important cases tried in Jefferson county circuit court, and soon his reputation extended into the adjoining circuits.

The first case that brought Colonel BIRD into prominence outside of Jefferson county was his defense, in 1878, at Portage, of Fox, on a charge of arson preferred by John J. Sutton, the prosecution being conducted by Colonel Vilas. The state presented a strong case of circumstantial evidence supported by the direct evidence of the two persons who set the fire. They pleaded guilty and swore that they set the fire under employment by Fox. The arguments were reported and published in full in the press, and it was undoubtedly mainly due to his keen analysis of the facts and their logical presentation to the jury that, greatly to the surprise of the audience in attendance at the trial, a verdict of acquittal was won within nineteen minutes after the jury retired to deliberate.

Colonel BIRD's ability as a lawyer and prominence at the bar is well illustrated by three important cases—the Watertown bond cases, the Jefferson milldam litigation, really an extended series of cases covering practically all of the milldams in the Rock and Crawfish rivers above Janesville, and the so-called Gerrymander suits. The litigation covered by these three cases was especially notable in that each case was a pioneer in an original field, and the decision in all three of the cases fully supported the contentions made by Colonel BIRD. The Watertown bond litigation involved over $3,000,000 and continued for some fifteen years. It was prosecuted through all the courts, state and national. Colonel BIRD conducted the defense for the city and was successful at every step. The ablest legal talent was arrayed against him in the progress of the litigation, among others Senator Matthew H. Carpenter, Senator William F. Vilas, Senator Edmunds of Vermont, Mr. Jenks of Pennsylvania, and Jenkins, Winkler & Flanders of this state.

In the milldam litigation Colonel BIRD represented the Greenes as defendants. It was undoubtedly the most important litigation of the kind that had been instituted in this state. More than a dozen suits were pending at one time in the different courts, state and national, and involved in their trial the condition of the country for thirty miles above the mill power from 1837 down to the time of the trials. The defense was successful in every case. It

was in such litigation as this, where Colonel BIRD's ability compelled recognition from both bench and bar. His ability and industry, his habit of carefully analyzing the facts and propositions of law involved, his excellent judgment in separating the material from the immaterial, and his energy and determination in fighting for what he believed to be right, account for his remarkable success in the conduct of the important cases that were intrusted to his care.

In the Gerrymander litigation Colonel BIRD was associated with Senator John C. Spooner. These cases settled the important principle that courts are properly clothed with jurisdiction to pass upon the constitutionality of apportionment laws, even should there be involved in the decision a political question. Perhaps no more important decision was ever rendered by the Supreme Court of this state. The principle here determined was vital to the continued existence of free republican government. The written brief and argument showed a most thorough and extended research into the principles of law involved, and the oral argument of Colonel BIRD stands as perhaps his ablest legal effort.

It is much to be regretted, upon such an occasion as this, that too often those who know best the departed have already passed beyond. This is especially true as to Colonel BIRD. There are few lawyers now in active practice who are really his contemporaries. The fact is, he belonged to what might be called the old school of lawyers, to the class represented by such men as Winans, Fethers, Vilas, Woodward, Bouck, Felker, Cate, Quarles, Hayden, Gregory, Pinney, Sloan, and others. Perhaps it was not common to hear the word "brilliant" applied to Colonel BIRD. He was not brilliant in the way that some of those mentioned were brilliant. His strong characteristics were his tireless energy and industry and his capacity for exhaustive research and the getting to the bottom of things. These qualities, coupled with a logical and discriminating mind and a clearness and precision of expression and remarkable memory, constituted his strength. The thoroughness with which he prepared his cases both on the law and the facts was unusual. Hence he was never taken by surprise upon the trial.

Mr. George G. Greene of Green Bay, who was associated with Colonel BIRD in the milldam litigation and in the second Gerrymander litigation, speaking of his ability and of his manly personal qualities, says:

"Colonel BIRD was forcibly logical and had tireless energy in preparation of cases and the skill therein that quickly and with most effect directs judicial attention to controlling questions. This skill implies the essential qualities of a good lawyer; of a great one, if possessed in high degree. It requires not only mastery of

the law of cases, but wise choice of the order and manner of presenting facts by pleading and in argument. Such logic, energy, and skill gave Colonel BIRD repute in his early practice at a bar which included Judge Orton, Colonel Gill, Colonel Thorn, Enos, Barber, and Weymouth.

"Our work in each of the cases mentioned included review of a great mass of facts involved in the transactions whose legality was questioned; discard of all facts unessential to the points raised; presentation of the law and the facts relied upon in effective relation and order. My estimate of Colonel BIRD as a lawyer rests much on his performance in these cases, wherein he was senior counsel and did the most meritorious work. Granting the competency of the critic, there could hardly be better means of judgment; for the actions, in the number and nature of their legal questions dependent on multiplicity of facts, were representative of lawsuits that severely test professional ability in their conduct.

"Our intimacy in these cases and earlier and later acquaintance did more for me than win respect for Colonel BIRD's legal attainments. We became friends. Too often such joinder of counsel arouses envy and, hence, dislike; sometimes more than their arrangement in a case as adversaries. GEORGE BIRD was free from any feeling of selfish rivalry; was always kind, cordial, considerate, generous, and informing. His purpose was to show that the law on the facts was with his client; and in that effort he welcomed with due acknowledgment any aid from an associate, and, in rounded measure, gave him credit for success."

Any one so fortunate as to be associated with Colonel BIRD in the trial of cases will bear witness to the tribute of Mr. Greene. Colonel BIRD's conduct toward younger members of the bar, who frequently called upon him for assistance in the trial of their cases, was ideal, and won for him their grateful appreciation.

The only political office Colonel BIRD ever held, if such it may be called, was that of chairman of the town of Jefferson and a member of the county board for two years. This limited experience as an officeholder does not, however, indicate the measure of his interest in political affairs. He was a Democrat and proud of it, and the call of his party never went unheeded, whether in its counsels or for service upon the stump. His honest belief in the principles of his party and the zeal and ability with which he expounded them made him much in demand both by local and national party committees. He was selected as a delegate to four Democratic national conventions, and was once chosen as a candidate of his party for member of Congress.

Colonel BIRD was a warm friend of his *alma mater*, the State

University. Perhaps no alumnus was a more loyal or enthusiastic supporter of its interests. His farsightedness saw for this institution a future which, though in some respects still unattained, yet is no longer within the field of mere prophetic vision. His influence in support of this institution was continuous and effective. Sons and grandsons of his former student friends were frequent visitors at his office for counsel and advice as to plans for their education, and many a student was drawn to this institution through the extensive and inspiring correspondence carried on by Colonel BIRD. All of his children, his two sons and daughter, are honored graduates of the University, and at the present time a granddaughter and a grandson are in attendance upon its classes.

Colonel BIRD was a regular attendant upon the services of the Baptist church of this city. He was deeply interested in its work and welfare, and gave liberally, not only of his means but of his time. Among other important labors in its behalf, he served as president of its board of trustees for some eight years.

Colonel BIRD, though passionately fond of the work of his profession, never lost sight of his duty to the city, the community, the neighborhood, in which he lived. He was in all respects a good citizen, a good neighbor, and a good friend. The public schools, public library, public parks, and recreation grounds, the city's health, its cleanliness and sanitation, its form of government and character of its officials, the neighborhood club, the social center meetings in the public school buildings,—all of these things not only interested him, they found in him a courageous and enthusiastic champion. Indeed these were the things that seemed to especially interest him in the last years of his life subsequent to his withdrawal from the active practice of his profession. His unbounded energy would not permit him, even when he threw off the cares and responsibilities of his profession, to devote his well-earned leisure to rest and recreation. He was more than ever active in all movements for the welfare of his city. This period of leisure gave him, moreover, an opportunity, which the demands of his profession had theretofore denied him, of gratifying his interest in certain lines of literary work. It was during this period that he wrote several noteworthy papers upon subjects which particularly interested him. These and other papers and addresses, as well as his legal pleadings and arguments, both written and oral, demonstrate his scholarly attainments. He was a man of large reading, and of careful, accurate, and honest thought. He loved the truth, and enjoyed the investigation and discussion of literary and political subjects. It was a pleasure to him to debate public questions, and he exhibited remarkable mental power in such discussions.

Colonel George W. Bird.

An intimate personal friend of Colonel BIRD, Mr. Rufus B. Smith, an honored member of this bar, gives the following just and truthful portrayal of the character of our lamented brother:

"In his intercourse with his friends and acquaintances he was a gentleman. I do not of course mean that he was weak; that he had no opinions of his own; that he did not sometimes assert himself and his opinions, or that he was always complaisant in his intercourse with others. He was a man of strong personality. He had opinions, and there was never any disinclination on his part to maintain his opinions, but he nearly always did it with the most scrupulous courtesy and with regard for the feelings of those with whom he was conversing. In the last sentence I used the words 'nearly always.' I used them advisedly. There are some people, good people, excellent people, who can go through this world keeping silent in relation to the things they do not like and giving no sign when things offend them. Such cold impassiveness may be a valuable quality, but our dead brother did not have it. The electric spark does not reach the explosive any more quickly nor cause the explosion any more certainly than would be the explosion of his anger at anything that savored of meanness, treachery, or trickery. Many times in forty years of professional and personal intercourse I have seen his muscles suddenly become tense and his eyes flash, and he would pour out the hot lava of his wrath like a volcano. He could no more help it than he could have been guilty of the meanness or the treachery or the trickery that aroused him. On some such occasions it is proper to say that I have even heard from his lips expletives like those used by George Washington on one or two occasions, but which I know were used by him as they were by Washington, involuntarily and without any thought of coarseness or wickedness. But when the explosion was over (and it was always ever soon) he would again become the kind, genial, courteous gentleman. As such we all know him and as such he is entitled to be remembered."

Upon his office desk Colonel BIRD pinned the following sentiment as expressed by the attorney general of the United States to the graduating law class of Yale University:

"Let me recommend the ideal of a good lawyer—I do not say a great lawyer, but a good lawyer—an ideal that has been realized in the life of every substantial city and every courthouse town, especially in the older neighborhoods: A man of kindly disposition, friendly alike with his well-to-do and poorer townsmen, acquainted with their habits and history, and having a pretty accurate notion of their opinions and prejudices, as well as of their ways and means, genial and sociable in manner, alert, shrewd in his observations, wise, but with perennial humor and love of pleasantry; as a citi-

zen always concerned, active in his interest in his town, in his county, in his state, and in his country."

Such a lawyer and such a man was Colonel GEORGE W. BIRD.

JOHN M. OLIN,
STEPHEN W. GILMAN,
T. C. RICHMOND,
Committee.

Mr. Samuel T. Swansen of Madison also spoke in eulogy of Colonel BIRD, but no record of his remarks has been preserved.

Mr. Justice BARNES, on behalf of the court, responded:

The memorial just presented gives a fair though necessarily a brief epitome of the life and character of Colonel BIRD. He was one of the last survivors of a band of lawyers who began their professional work in this state about a half century ago and who rose to eminence in their profession. Those of us who have seen him in action while he was still vigorous can form some estimate of a generation of lawyers among whom he occupied an honorable place. Fortunate in having a liberal education, he was still more fortunate in being endowed with an unusually well balanced mind and a large capacity for prolonged work.

Colonel BIRD was industrious, thorough, and painstaking in the preparation of his cases. He was a safe counselor, and presented questions of law and fact to court and jury with lucidity and force. Such an antagonist is rarely taken by surprise and is always to be feared. It is perhaps no particular credit to him to say of him that he was unswervingly honest and never resorted to chicane or subterfuge to secure the temporary success which is often sought by the opportunist. His innate integrity rendered such a course impossible, and his consciousness of his own strength and ability to meet emergencies and win cases on their merits rendered it unnecessary. In old age as in youth he lived in the present. He was a thorough believer in democracy and in the ability of the people to work out their own salvation and govern themselves wisely and intelligently. He never fawned upon nor flattered the great or strong, and often lent his sympathy and his support to the unfortunate. He lived long enough to fulfil his mission on earth, and the world is better because he lived.

As an example of a virtuous, kindly, and manly man who by his industry and integrity not only won a commanding position at the bar but an equally enviable place as a citizen, no one can under-

take to place a limit upon the influence and inspiration which his character produced on the younger generations.

His friends will long miss his kindly face, his familiar figure, and his cheery greeting, but can take solace in the reflection that

"There is no death! What seems so is transition;
This life of mortal breath
Is but a suburb of the life elysian,
Whose portal we call death."

## GENERAL EDWARD S. BRAGG.

Mr. T. L. Doyle of Fond du Lac then addressed the court:

*May it please the Court:*—The committee appointed by the Fond du Lac County Bar Association for that purpose herewith present for record in this court a brief memorial of the life and services of the late EDWARD S. BRAGG, whose death occurred June 20, 1912.

*Memorial of the Fond du Lac County Bar Association.*

EDWARD STUYVESANT BRAGG was born at Unadilla, Otsego county, New York, on February 20, 1827, a son of Jasper and Margaretha Kohl Bragg.

His education was finished by a three-year course in Hobart College of Geneva, New York, after which, in 1848, he was admitted to the bar.

In 1850 he came to Fond du Lac, Wisconsin, where, with the exception of temporary absences on official duties, he resided and practiced his profession until his death on June 20, 1912.

In connection with the early practice of law, he took an active interest in municipal affairs, holding several positions in the city government, and in 1854 was elected district attorney of the county.

On the 2d of January, 1855, he was married to Miss Cornelia Colman, a granddaughter of Colonel Nathaniel Rochester, one of the founders of the city of Rochester, New York, and a sister of Colonel Edward Colman of Fond du Lac.

Six children were born of this marriage. Two of the sons, Harry Sweet and Rochester, died in childhood. William Kohl Bragg died at the age of twenty-one after receiving a military education at the Pennsylvania Military Academy. The eldest daughter, who married Clarence W. Henry, died October 18, 1895, at the age of forty-one. The second daughter, Margaret, married Frank H. Sherman, an officer in the United States navy, who have two children, Edward Bragg Sherman and Helen Leslie Sherman. The third daughter, Bertha, married George Percival Shriven, now a brigadier

general in the United States army, who have two children, Elizabeth and Catherine.

In 1860 he was sent as a Douglas Democrat to the national convention held at Charleston.

When the Civil War broke out he at once became a strong and vigorous supporter of the Union side, and addressed the first mass meeting held in the city of Fond du Lac after the news had been received of the fall of Fort Sumter, at which resolutions were adopted pledging support to the government in suppressing the rebellion.

He recruited a military company called the "Bragg's Rifles," of which he was elected captain. His commission bears date of May 5, 1861, and his company was made Company E of the Sixth Regiment of the Wisconsin Volunteer Infantry. This regiment was mustered into the United States service for three years on July 16, 1861, left the state for Washington on the 28th, where it arrived August 7th, and was immediately assigned to General Rufus King's brigade in the Army of the Potomac, and went into camp on Meridian Hill.

He was promoted to major of the regiment September 17, 1861; lieutenant colonel, June 21, 1862; colonel, March 10, 1863; and was commissioned brigadier general June 25, 1864, on the recommendation of General Hooker for bravery at Fitz-Hugh's Crossing.

General BRAGG participated in the following battles in 1862: Rappahannock Station, Gainesville, Second Bull Run, South Mountain, Antietam, and Fredericksburg. In 1863 the following battles: Fitz-Hugh's Crossing preliminary to the Chancellorsville campaign, where Colonel BRAGG with his regiment and the Twenty-fourth Michigan crossed the Rappahannock river in open boats, in face of the enemy, and established a lodgment on the south side of the river; Chancellorsville, and Mine Run. On the 5th and 6th of May, 1864, he participated in all of the battles of the Wilderness.

He was detached from his regiment and assigned to the command of a Pennsylvania brigade, which he commanded in the battles of Spottsylvania, North Anna River, Hanover Crossing, the battles on the Tolopotomy Creek and Cold Harbor.

At the Chickahominy, in June, 1864, he was assigned, although a colonel, to the command of the Iron Brigade, which he commanded at the assault upon Petersburg, the battles of Welden Railroad, Hatcher's Run (October 27–28, 1864), and Mine Run. He also commanded the Iron Brigade in the advance line in the battle at Dabney's Mill (Hatcher's Run) February 5–7, 1865. Soon after this he was detached and assigned to special duty at Baltimore.

He was shot and severely wounded in the battle of Antietam, and was removed unconscious from the field, but after his wound was dressed he returned later in the day to take his place in the line of

battle. He was once knocked from his horse by the concussion of a cannon ball, sustaining only temporary injuries from the fall.

According to the most reliable history of the war, the Iron Brigade, which he commanded, sustained the greatest loss in killed in battle of any brigade in the war, and of the two thousand regiments which lost men actually killed in battle, his regiment, the Sixth Wisconsin Regiment, stands tenth in the list.

For his skill and bravery in the battles of Gainesville, Second Bull Run, South Mountain, Antietam, the Wilderness, Petersburg, Hatcher's Run, and Dabney's Mill, he was complimented in the official reports of his superior commanding officers.

General BRAGG rendered most conspicuous service in nearly all of the fierce conflicts in the four years campaigns of the Army of the Potomac against the enemy, and earned the reputation of an able and fearless soldier.

He was mustered out of the service October 9, 1865, and returned to the practice of law at Fond du Lac.

General BRAGG was postmaster of Fond du Lac in 1867, represented Fond du Lac county in the state senate in 1868 and 1869, and was chairman of the Wisconsin delegation to several Democratic national conventions, and was a candidate before the legislature of Wisconsin for United States senator in 1875 and 1893.

He was a member of the Forty-fifth, Forty-sixth, and Forty-seventh Congresses (1877–1883) and the Forty-ninth Congress (1885–1887). He was chairman of the committee on War Claims, and gained a national reputation by his determined and successful opposition to the Southern war claims, which were then being presented in Congress for payment, but were defeated largely through his efforts.

He was also a member of the committee on Military Affairs and its chairman in 1886–1887. As chairman of this committee he advocated the passage of a bill to set aside the findings of the court-martial dismissing Major-General Fitz-John Porter from the service for alleged misconduct and disobedience of the orders of General Pope, commanding the Army of the Potomac, at the second battle of Bull Run in August, 1862. The justice of the findings of the court-martial was the subject of bitter controversy for more than twenty years. Numerous appeals had been made by Porter to have the case reopened without success. While General BRAGG took an active part in this battle, in addition to his personal knowledge he afterward made a special study of the position of the army in the different parts of the field, and was able, in the debate on the bill, to speak with great clearness and force, so that it was passed by a decisive majority in 1886, and was approved by President Cleveland and became a law.

He was regarded, during his Congressional service, as a debater of unusual ability and power, and held a place of great prominence among the public men of the time.

He was appointed minister to Mexico by President Cleveland in 1888–1889, was consul general to Havana from May 19, 1902, to September 19, 1902, and on September 15, 1902, was appointed consul general to Hong Kong, in which position he served until 1906.

General BRAGG was an able and distinguished member of the bar for more than sixty years. Into the practice of the law was thrown his greatest strength and the most brilliant qualities of his intellect. None could excel him in the preparation of cases for trial. His pleadings, both at law and in equity, were models of perfection and could be safely followed as precedents.

In his trial of cases at the circuit court, his clear and concise statement of the facts was so masterly as to win verdicts from juries and judgments from courts. He often confessed in his speeches that he was a plain, blunt-spoken man, devoid of magnetism or oratorical art, but possessed only of the earnest conviction of the truth of his statements. There was no cant or hypocrisy in his composition. Words with him served the true purpose when used to express, not conceal, ideas.

He had a large and important practice and his hold upon his clients was strong, for although he might temporarily turn aside to accept public service, yet whenever he returned to his profession clients would again throng his office.

He never had any partners, relying on his own ability in the trial of his causes. His arguments of cases in the Supreme Court, in time and extent, surpass those of any other lawyer, extending from *Roberts v. Delaney*, 2 Wis. 382, at the December term, 1853, to *Comstock v. Boyle*, 134 Wis. 613, at the January term, 1908.

Former Chief Justice WILLIAM P. LYON, in the Bench and Bar of Wisconsin, pays General BRAGG the following eloquent tribute:

"Prominent in the list of names of those lawyers of Wisconsin who have honored the state by their ability, brilliancy, and fidelity to professional obligations will be found the name of EDWARD S. BRAGG, who, for nearly half a century, has been a central figure in the state and federal courts.

"Before General BRAGG commenced practice he had acquired an unusually thorough knowledge of the elementary principles of the law, and on that solid foundation, by continued and well-directed study and thought, inspired by profound love of his profession and appreciation of its true dignity, he has become one of the great lawyers of the country. Although he has served with conspicuous ability in the halls of Congress, and with equally conspicuous gallantry and patriotism as a soldier during the late War of the Rebellion,

and although he has given his service freely to promote the success of the political party with which he is identified and in the councils of which he exerts a commanding influence, he has never ceased to make knowledge and successful pursuit of his profession the paramount business of his life. Comparatively few have such a record for professional fidelity, and fewer still for professional success.

"General BRAGG has not only a strong, clear, analytical mind, which enables him readily to grasp and retain legal principles, but he also possesses the much rarer ability—indispensable to greatness whether as a lawyer or judge—to correctly apply those principles to the facts of each case as they may be established by the evidence. He also excels in the ability, so essential to a lawyer's success, to make a clear and logical statement of such facts to the court or jury. Many a meritorious case has been lost because of an imperfect or bungling statement of facts, but it would be a surprise to the bench and bar of Wisconsin to learn that General BRAGG had lost one for such a reason.

"In the speeches and writings of General BRAGG little mere rhetorical ornamentation is found, and no straining for effects. As a speaker he is pleasing, calm, and convincing, and always commands marked attention. His style is terse and vigorous, and he excels in logical power. Indeed, his premises granted, it is difficult, usually impossible, to escape his conclusions. It is not easy to determine in which forum—the trial or appellate court—he is strongest, for he possesses very high qualifications for success in either, but whether in one or the other his arguments are always learned and sincere, and hence are valuable aids to the formation of correct judgment. This is the true function of argument.

"It may properly be said in conclusion that General BRAGG is a most consistent and faithful exponent and practitioner of true legal ethics. This is the rock upon which his reputation and all enduring professional reputations are builded. When the next generation shall make up the roll of great lawyers who lived and flourished in Wisconsin during the first half century of its existence as a state, it is confidently believed that the name of General BRAGG will have thereon a prominent and honorable place."

Judge CHARLES E. DYER in the same work presents his estimate of General BRAGG in the following language:

"To General E. S. BRAGG has long been deservedly accorded a position of leadership in the ranks of the legal profession. His prominent identification with the bar of the state began at an early period and has continued without interruption, whether actively connected with professional work at home or engaged in the public service of his country as soldier, legislator, or national represen-

tative abroad. No more brilliant galaxy of lawyers ever adorned the professional annals of a state than that in which he may justly claim equal membership in high and meritorious service. Surviving many eminent contemporaries, he continues to maintain a rank and reputation in the profession which no rivalship in the past or present has been adequate to abate. Nature endowed him with the qualities of a great lawyer. Born and bred to the law as the bird to the air, his equipment for the profession is as natural as it is efficient and complete. Instant in discernment, vigorous in thought, and apt in expression, forensic discussion becomes with him playful enjoyment in comparison with the labored efforts of those not possessed of aptitude for debate. Grounded thoroughly in fundamental principles and in the best learning of the law, he naturally and instantly distinguishes what is superficial from what is sound, and, repudiating the former, takes his stand on the solid ground of elementary principle and logical reasoning, rather than on the dictum of some chance authority easily invoked in support of fallacious argument. To such a lawyer, Richard Tidd is better authority than shelves of modern books of Practice and Pleading.

"By genuine right of natural possession must be accorded to General BRAGG the qualities of the true, competent, and accomplished lawyer. When he promulgates a legal principle, whether of application or construction, he gives no false or uncertain sound. Sharp, clear, concise, apt in statement, his conclusions always follow his premises in good marching order. He fights in a trial at *nisi prius* as he fought on the battle field, with courage, sincerity, singleness of purpose, and tenacity. Nothing escapes or eludes him. If struck, he strikes back with ease and celerity, and never loses his self-command. Pertinent in illustration, quick in repartee, clear and cogent in argument, he never loses sight of the controlling question or the main point in the case. He never shoots at random, but always at the mark. That is one of his distinguishing characteristics. His fire is never scattering, but always concentrated.

"Broad in his knowledge of general literature as in that of the law, and rich in abundant accumulations, carefully stored in a faithful memory, but kept ready for instant use as occasion requires, he is as delightful in conversation and companionship as he is dextrous, able, and accomplished at the bar. His reputation is national. Wisconsin takes just pride in his career as lawyer, legislator, soldier, and civilian. His name is associated with deeds of valor. His fellows say of him, he could not be BRAGG if he were not brave. Yet his tenderness of heart was most touchingly illustrated when, during a visit at one of the charitable institutions of the state, a lady asked him to tell a war story to an audience of

orphan children, and he replied: 'I can face a cannon, but truly, have not the courage and cannot trust myself to speak to these orphan children.' "

Throughout his long career as a lawyer, soldier, statesman, and diplomat nothing stands out more conspicuously than his active and profound devotion to the welfare of his country, and the following message of this great leader to his countrymen may fittingly close this tribute to his memory:

"Let us have a simple republic, trusting for its strength to the love of its citizens and the wisdom of its laws."

NORMAN S. GILSON,
H. E. SWETT,
T. L. DOYLE,
Committee.

Mr. H. E. Swett of Fond du Lac then spoke as follows:

*May it please the Court:*—On behalf of the Fond du Lac County Bar Association it is now my duty, and I esteem it an honor, to speak in memory of one of our members who reached to heights unattained by any other man of this bar.

When General BRAGG passed from among us, Fond du Lac lost its most renowned and impressive figure. His rare abilities had raised him to such eminence in the nation that his residence among us was a distinction. The Fates who attended at his birth, and all of them seem to have been called, gave lavishly, and his weaknesses were emphasized by contrast with his talents.

He was of the type of Alexander Hamilton and Daniel Webster, and, as did they, he strayed somewhat from the paths which convention hedges. The force of genius which raises such men, unfits them from quietly following the lines of social prescription. They have red blood. They do things. They hew the way in front.

His temperament fitted him for an eventful life, and such a life he lived. The record of it would disclose infinite variety and be of thrilling interest. When he was still but a boy, the lure of newness, of contest, and of conquest brought him here, and he builded a home and became famous in the wilderness. At the call of his country, and with ever increasing fame, he served on its battle fields, in its legislative halls, and at foreign courts.

His striking personality, brilliant wit, and convivial nature compelled attention wherever he went. He had an intimate personal acquaintance with practically all of the great men who made our history during the days of '61 and since then. Lincoln, Grant, Greeley, Sheridan, Sherman, Cleveland, and Taft were among those whom he knew.

General Edward S. Bragg.

His equipment as a lawyer fell little short of filling the ideal of our profession. Many of the most prominent men of his time, on the bench and at the bar, gave him the highest rank in different lines of proficiency.

The late Chief Justice CASSODAY said of him: "I think that General BRAGG is the ablest pleader at this bar. I obtained from him a pleading which I especially admired and gave it to my son as a model."

Hon. James G. Flanders of Milwaukee said: "General BRAGG was the most skilled and thorough cross-examiner that I ever knew."

Judge W. J. TURNER said: "General BRAGG made the best arguments on the facts before a jury that I ever heard."

The late John T. Fish said: "The most effective, brilliant, concise, and able argument that I ever heard delivered before the Supreme Court of this state was made by General BRAGG."

Judge GEORGE W. BURNELL said: "General BRAGG saw the point on which a case turned more quickly and surely than any other lawyer I ever knew."

The late Chas. W. Felker said: "General BRAGG's recollection of cases in point on any proposition which might arise was marvelous."

Ex-Senator John C. Spooner said: "Of all the lawyers whom I have known, General BRAGG had the most thoroughly comprehensive knowledge of the general principles and the groundwork of the law."

These men were fit judges and they knew whereof they spoke. Lawyers of his intellectual stature are rare. Generations may pass before his equal is seen again among us.

Truly democratic, he associated on a friendly and familiar footing with the members of every element of society. He knew the underworld and each of its many subdivisions. He knew the lives of the producing middle classes and he knew the upper classes. He recognized the relations between these elements and the relative significance of each as a part of the whole. Wonderful indeed was his intimate knowledge of the different phases of human life. He came close to men and read their souls.

Compellingly strong within him all of his life was the spirit of adventure. Even after Time had blinded him, deafened him, and crippled his legs, news of stirring deeds anywhere in the world aroused him to eager interest and he longed to enter the lists.

His instincts and talents fitted him to be an ideal soldier of fortune, and the vagaries of chance held for him a resistless fascination. He keenly felt the calls which have led so many into the path of the rover and on down to vagabondage, but love of home and family was his anchor, and it held. The place where he died was the place where he had lived all of his long life among us.

There was scarce a height to which the intellect of man may attain which was beyond the range of his manifold talents.

He was tenderly devoted to his family and generous to a fault with those whose necessities appealed to him. The sarcasm, cutting wit, and biting irony which he used with brilliancy and great effect in forensic efforts and in the conduct of litigations marked him in the public mind as harsh and without sympathy. This impression was strengthened by the fact that he was primarily a warrior and permitted very few to come within his intrenchments where they might learn of his inner life. Then, too, in his deeds of kindness he did not let his left hand know what his right hand did.

He never knew fear; opposition enticed him, contest delighted him, and he was always where the fight was thickest. Wounds, hardships, and defeats did not daunt him, but when the hand of Providence was laid upon him in the death of his only son, his spirit flagged, and he faltered. His son was the center of his brightest hopes. Fondly he had dreamed of the laurels which he would aid his boy to secure, but just as the lad was crossing the threshold of manhood, Death enfolded him in its mantle. There was no longer a son for the father to yearn over and to build for. The day lost its brightness and life lost its fulness. However, other loved ones were dependent upon him and duties lay at hand. He took up his burden and marched on—bravely, doggedly. He steadfastly faced the front with head held militantly erect, but the weight of this bereavement lay ever upon him.

Grimly forceful and vigilantly alert in protection and support of those within his home nest, he fought his way on down through the years; fought his way against weakness and want; fought his way against time and disease that he might not leave his loved ones to stand alone.

A gnarled, battle-scarred, stern old fighter he was, yet he illustrated that "None are so tender as the brave."

We mourn his passing as that of the greatest light which ever shone among us. Long and reverently may his memory be cherished.

Mr. Maurice McKenna of Fond du Lac then said:

*May it please Your Honors:*—The members of the committee, including Hon. N. S. Gilson, its distinguished chairman, which has presented to this court on behalf of the bar of Fond du Lac county, Wisconsin, a memorial of the late General E. S. Bragg, have honored me by requesting that I contribute something additional thereto. This wish is, probably, chiefly founded upon the fact that I have been a neighbor and acquaintance of the deceased for a period

of time longer than any other living member of said bar, and, so far as I know, exceeding that of any other attorney in the state. At the time of his death I was abroad, and received in my mail at Paris, France, the first intelligence of his decease.

Emigrating from the state of New York in 1850, he settled at Fond du Lac, Wisconsin, a lawyer but twenty-three years of age. Four years later my parents came to the same state and settled on a farm in the vicinity of said city. As a small boy I can remember the enviable reputation for ability and brilliancy enjoyed by him among the hardy pioneers of our section of the country, hewing their way through primeval wilderness. Although this skirmish line of civilization was closely knit together by the common ties of toil and hardship, still they sometimes had their differences. Even in those far days his services were eagerly sought by them, and he participated in the majority of their controversies of those bygone times, in the courts of country magistrates, where "catch-as-catch-can" was often the cardinal rule of practice, while the goddess of Law floated aimlessly down the current of the stream. He figured prominently then in many a hard-fought legal battle, with all the vim and spirit of his youthful prime, no doubt but little realizing the long, arduous, and eventful career on the threshold of which he stood.

I well remember the first trial of a case I ever attended as a spectator or otherwise. It is now nearly fifty years ago. It was that of *Hardy v. Wright*, which afterward came to this court and appears in 22 Wisconsin Reports, page 334. It took place in the old frame courthouse at Fond du Lac, being a malpractice case. He was on one side, and the late United States senator, Matt H. Carpenter, was on the other. The principal of the school where I was then a pupil kindly granted me a vacation for the time the long trial consumed. Each of these two mental giants threw his whole soul into his task, both men proceeding without acrimony, but with great energy, ability, and zeal. Eminent surgeons from several cities appeared as experts on either side of the same. Senator Carpenter, opening and closing for the plaintiff, occupied about two hours before the jury. General BRAGG, for the defense, talked uninterruptedly for a stretch of four hours. It was a great trial, a rare entertainment, and an education for me, making an impression that has ever since vividly remained, and will continue to remain during the balance of my life. Since then I have witnessed many important trials and taken part in some, but no other has ever left upon my memory so indelible a stamp.

Both of these men were plain lawyers then. Each, however, was destined later on to rise to great eminence in more than one field of human endeavor and acquire a reputation that extended beyond

the boundary lines not only of their adopted state, but of the nation in which they lived, and in the highest council halls of which each played an important part.

In any assemblage General BRAGG was remarkable, and always capable of standing in the van of the ablest to be found within it. Pertinent to this statement, allusion may here be made to the Democratic National Convention of 1884 at the city of Chicago, Illinois, where Grover Cleveland received his first nomination for the office of President of the United States. In defiance of the majority of the delegates of the state of New York, and particularly facing the eloquent Senator Grady, he championed Cleveland's cause, and, in a speech that made him known throughout the land, uttered the immortal sentence: "We love him for the enemies he has made." In incisiveness, appositeness, and virility it was as striking as one that even Shakespeare himself might write. It became at once a classic that will go riding down the ages long after all others delivered there are shrouded in oblivion. As a reward, no doubt, for this effective speech, President Cleveland tendered him the office of Chief Justice of the Supreme Court of the District of Columbia, which, however, he unhesitatingly declined.

He was of slight stature and apparently effeminate physique, not averaging much more than 125 pounds in weight. In his latter years his appetite was poor. He ate very sparingly. But he was absolutely fearless and seemed almost wholly unable to understand the condition of defeat.

I have personal knowledge of one criminal case in our circuit court of Fond du Lac county, Judge GILSON, chairman of this memorial committee, presiding, when, on the morning the trial commenced, he was hardly able to crawl up the single flight of stairs that led from the main floor to the court room there. He had been appointed to assist in the prosecution and, as was usual with him, assumed the burden of his side of the case, doing nearly all the work therein. It continued for several days. I was one of the attorneys on the opposite side. As I saw him stagger up that flight of steps the morning the trial opened, I felt sure that he could never conclude his task and that he must certainly physically collapse long before the end was reached. Instead of such an outcome, I was amazed at the fact that as the trial proceeded his strength increased, and at the conclusion no one connected with it appeared to be fresher or more vigorous than he. The intoxication of conflict seemed to give him a new store of vitality, and apparently he could have stood the strain though the trial were many times prolonged.

The only occasion when I ever noticed that he was visibly affected was at a banquet given in his honor in the city of Fond du Lac shortly before his departure as United States consul general to

Hong Kong, China. A large number of citizens of his home town and of the state, representatives of many professions and callings in life, were gathered to bid him God speed. As president of our county bar association I sat beside him. Rt. Rev. Bishop C. C. Grafton, of the Episcopal denomination, sat immediately at his left. The bishop was a near neighbor, a close friend, a member of the same church, and about the same age, but preceded him in death. At this gathering several of the guests were called upon to deliver short addresses. The General, too, was called upon, responding briefly. In subdued conversation which, at intervals, the clergyman and I then had with him, we could plainly observe that his voice was broken, while furtive tears glistened in his eyes. We could easily see that he was making a heroic struggle to stifle his emotions, but we dissimulated, by acting unconcernedly, as though we discerned nothing unusual in his manner. He no doubt was thinking of the long journey he was soon to undertake to the other side of the earth, to dwell among an Oriental race, thousands of miles away from his home and lifetime friends. He saw, in prospective, the possibility, and even the great probability, that he might never again return alive to the city endeared to him by many hallowed scenes of half a century.

As already stated in the memorial presented by said committee, he practiced before this court from his first case of *Roberts v. Delaney*, argued at the December term, 1853, to *Comstock v. Boyle*, argued here at the February term, 1908, and reported in 134 Wisconsin Reports, page 613. Both of these cases involve questions of practice. He lost the first and won the last, Chief Justice WHITON writing the opinion of the court in the former and Chief Justice WINSLOW in the latter.

During this period of fifty-five years of his practice here, eighteen judges of this august tribunal who heard his arguments have become ex-members, only one of whom survives him. In that space of time, seventeen of those judges, seven of whom were chief justices, have passed into that mysterious "bourne whence no traveler returns."

I might go on almost indefinitely, but must now conclude. A whole volume could be interestingly written having for its subject the life and times of General E. S. BRAGG. He achieved distinction as a lawyer, a statesman, and a soldier, three domains of honorable and exacting human effort. They who devote their lives to either, and rise to prominence, are in the small minority. He signally excelled in all.

I sadly contribute these desultory paragraphs to the memory of one with whom many, many of the incidents of my life were closely interwoven. He was a member of the committee that conducted the

examination before Judge GILSON when I was admitted to the practice of the law. I was associated with him in the trial of several cases and his opponent in numerous others. I have traveled with him in a political campaign when he was first seeking a Congressional nomination. We had for our conveyance a single horse and buggy. Several of the roads in our county were rough and muddy, and sometimes we rode together in the storm and darkness of the night, when we had to depend largely on the natural instinct of the animal we drove and the frequent flashes of the lightning to keep us in the track.

But his campaigns on earth are now over. He lived to a ripe old age. Nearly three generations of men have come upon the earth and passed away during his long, active, and eventful career. He will appear in the courts, or halls of legislation, or as an accredited representative of his nation, no more. He "sleeps the sleep that knows no waking." His Creator has called him home.

On behalf of the court Mr. Chief Justice WINSLOW responded as follows:

The number of those who can speak from personal recollection of the days of 1861 is relatively small and is growing smaller every year. As I reflect upon it now it seems really a wonderful thing to have lived, even as a boy, during that remarkable time. There was a patriotic thrill which seemed to pervade the very atmosphere; the shrill call of the fife and drum floated on every breeze; the village common saw the daily drill of eager youth; war meetings full of earnest men assembled almost nightly to consider ways and means of upholding the hands of the government in the terrible crisis; women put by their household tasks and plied their needles in preparing comforts for the camp and hospital; mimic soldiery paraded on every school ground; and young men daily left the college, the high school, the farm, the shop, and the office and swelled that great flood of generous youth that flowed steadily southward.

There was a new reverence for the flag, a deeper and truer realization of the significance of the Union. Few there were who did not feel a certain consecration to the great cause, and the ordinary cares of life passed almost unnoticed in presence of the life and death struggle of a nation. I greatly doubt whether there can ever again be a time when every class and condition of the people will be moved by such unanimity of thought and such universal high resolve.

Wisconsin was in no respect behind her sister states in this great outburst of patriotic fervor, and the profession of the law furnished its full quota to that great body of citizen soldiery which

the state sent to the front. Many of these lawyer-soldiers wrote their names large upon the pages of both state and national histories, but none was written larger than the name of EDWARD STUYVESANT BRAGG. He was of the stuff of which the greatest soldiers are ever made. Calm, resourceful, and iron-willed, he never put his hand to the plow and looked backward; when his mind was once made up he knew not the language of retreat. It is not necessary for me to speak at length of his brilliant career as a soldier, nor of his subsequent public service as a statesman; both are justly and fittingly set forth in the memorial; he leaves the record of them as a heritage to a grateful nation.

A few words in appreciation of his career as a lawyer and this imperfect tribute must close.

It is but simple truth to say that General BRAGG had one of the clearest and most compelling intellects which has ever graced the Wisconsin bar. His logical processes were inexorably accurate and strong. It is quite truly said in the memorial that if one granted his premises there could be no escape from his conclusion.

As on the battle field, so in the contests of the forum he was calm and resourceful, not disturbed by untoward circumstance, but always apparently possessed of a store of reserve strength on which he could draw in case of need. If I were to criticise, I would say that he loved the contest of intellects so greatly, and enjoyed so much the trust and parry of refined logic, that he was not always the safest counselor. I think he felt so keen a pleasure when by the sheer force of intellect he won a case on some close and almost desperate point, that he was often tempted to rest on such a point rather than meet his opponent upon the merits.

But it is only fair to remember in this connection that General BRAGG belonged to a generation of lawyers which paid much attention to niceties of procedure and made little discrimination between those legal victories which were won on some fine point of practice and those which were won upon the merits of the controversy.

While General BRAGG'S position as one of the very strongest lawyers of the state was always acknowledged, there can be no doubt that the many years which he spent in the army and in Congress effectually prevented him from occupying that pre-eminent place in the profession which his talents entitled him to hold.

By his friends of all classes he was affectionately known as the "little General" until the very last. By his old comrades of the "Iron Brigade" he was well-nigh idolized. He died full of years and of honors. Another distinguished name is thus added to the roll of Wisconsin's lawyer-soldiers who have answered the last roll call.

Of them all we may say, paraphrasing slightly the language of the philosopher-poet of Persia:

> "For some we loved, the bravest and the best
> That from his vintage rolling time has pressed,
> Have drunk their cup a round or two before,
> And one by one crept silently to rest."

## SOLON H. CLOUGH.

Mr. D. E. Roberts of Superior then addressed the court and presented the following

*Memorial of the Douglas County Bar Association.*

*May it please the Court:*—The members of the Douglas County Bar Association desire to present a brief memorial of the late SOLON H. CLOUGH, who was for nearly twenty years judge of the Eleventh circuit.

His personality was so charming, his private life so exemplary, and his judicial service of such a high type that a summary of his career is well worthy of a place in the records of the Supreme Court, which he honored greatly and loved well.

Judge CLOUGH was born in Madison county, New York, on the 31st day of August, 1828, the son of a country merchant who gave him a common-school education and helped him prepare for college.

By taking advantage of certain conditions provided to aid aspiring young men, he was enabled to attend Hamilton College for two years, where he strengthened his instincts of a gentleman and acquired the tastes of a scholar, but he did not graduate. Many years afterward the college honored itself and him by conferring an honorary degree upon him.

After leaving college he studied law and was admitted to the bar in Syracuse, New York, in 1851. He was married at Fulton, Oswego county, New York, on the 22d of February, 1849, to Katherine Eliza Taylor. In 1858 he moved with his family to Wisconsin and settled at Hudson, practicing law. His first law partner was Henry C. Baker; and later he was there associated with Colonel Hiram Hayes, now of Superior.

In 1864 the Eleventh circuit was created, embracing practically all the territory now included in the counties of Ashland, Barron, Burnett, Chippewa, Douglas, Iron, Polk, Rusk, Sawyer, and Washburn. Shortly before that time SOLON H. CLOUGH had moved to a place near Osceola in Polk county, and in the spring of that year he

was elected judge of the new circuit for the term commencing the July following.

Judge CLOUGH served two consecutive terms and was succeeded by Henry D. Barron in 1877, who died before his term expired. Governor Rusk appointed Judge CLOUGH to fill the unexpired term of his predecessor; and he was again elected and served the full term. He declined to again be a candidate and earnestly supported the candidacy of Justice R. D. MARSHALL, his successor.

In 1868 Judge CLOUGH moved to Superior and there lived till he went to California in 1895, except a period of about five years when he returned to Hudson. He died on the 21st day of April, 1910, aged eighty-two years. His wife died a few years before his demise, and they were both buried in Mount Hope cemetery at San Diego in the state of California.

He invested the surplus of his modest salary wisely at Superior and thereby gained sufficient competence to live without worry and in comfort during his declining years. Surplus wealth was denied him, as it is generally denied to men who practice law or follow judicial careers. He lived the life of a sincere Christian. One who knew him most intimately says that his declining years were beautiful, full of gentleness and love for all who were associated with him. He approached "the great change" with hopeful prayer on his lips and with a sweet and gracious dignity,—confident of the better life beyond.

His intellectual inclinations and scholarly tastes continued vigorous until the end of his days. In middle life he took up the study of the French language, largely as a diversion. He became so proficient in it that he could read that language as readily as English; he enjoyed conversing in French, and in his later years the Holy Scriptures and French literature constituted his principal reading matter.

Socially he was a most companionable man; and he seemed to prefer the company of congenial friends to the solitude of his private study. He appreciated witty jokes and short stories if they were in good taste and appropriate to the occasion.

His nature was warm and sympathetic; he was inclined to accept men at their face value, and he enjoyed the esteem of all classes.

He commanded the confidence of litigants and held the respect of the bar.

When he was elected judge in 1864 there was no such mass and variety of precedents as can now be found in the Wisconsin Reports, to be resorted to for authoritative exposition of the law in this state. In those days lawyers and judges were forced to reason more upon principle and rely less upon authority than they do today. In the application of abstract legal principles to concrete

cases, SOLON H. CLOUGH was a past master. His thinking was habitually careful and naturally deep, his reasoning always strong. When his conclusions were called in question in the Supreme Court they were very generally upheld. He was cautious and enjoyed discussing his current cases with members of the bar, not interested, in whose judgment and discretion he had confidence, apparently to test the soundness of his own views, tentative or fixed, and for the sociability growing out of the discussion.

Forty years ago the Eleventh circuit had but a sparse population, living in widely scattered places, connected only by water routes, or stage lines running into the interior. Railroad communication was only a hope of the uncertain future. The proffered land grants in aid of railroad construction from the Mississippi to Lake Superior were not earned until sixteen years after Judge CLOUGH was first elected. The whole region was emerging from a wilderness condition, where today the tone of civilized life is as dominant as the atmosphere of the pineries was then.

In those days the output of private and local acts passed by the legislature usually exceeded the number of general laws passed at any session. Special privileges and petty monopolies were thought to be in harmony with sound public policy and promotive of general prosperity. The dominant powers in the land were great companies carrying on lumber operations, opening mines, and building railroads. Sometimes the arrogance of these corporations was equaled only by the contempt of their employees for the police regulations of the river towns. Ardent, hopeful, and vigorous life ebbed and flowed through the Eleventh circuit from the close of the Civil War until 1890 and later. The subjugation of a vast wilderness, the founding of new towns and villages, the building of railroads, and the legislative policy mentioned produced many new and intricate legal questions that came before the courts for solution. Legislative regulation had not been extended so far then as it since has been. The steadying hand of the state, its power and dignity were usually made manifest in some action or proceeding in the circuit court. The good fortune of the American people in having the right man in the right place at the right time was plainly illustrated by Judge CLOUGH; for he was able to meet and satisfactorily solve the new questions of his time, as an examination of the Wisconsin Reports from the 15th volume to the 70th will abundantly show. No man can relate the innumerable benefits conferred upon the northern part of the state in its formative period by SOLON H. CLOUGH as circuit judge, in his firm yet merciful administration of the criminal law; in his ability to grasp and solve the intricate legal questions that came before him, involving both vast and humble property rights; in his example of

a high-minded and upright life amid comparatively crude surroundings.

The plain people rejoiced at his coming, and lawyers who commenced their careers at the bar where he was the judge will never forget the kindly interest he took in them, and how often he pointed out the right path for them to follow when the way seemed dark and uncertain and obstructions terrifying.

We all know that good government cannot be created by legislative mandate alone.

He believed that change is the law of life and that changes in law are inevitable in human affairs; but his conviction was that in making changes we should hold fast to principles and institutions that have stood the test of ages and proved themselves to be good; that good government can only flourish in well-prepared soil and when nourished by political, social, and moral forces not confined to courts or legislatures. He did much towards creating in Northern Wisconsin admiration for good government in its comprehensive sense. He strengthened the confidence of the people in the courts and in their respect for law. He served our commonwealth well in his day and generation; and his good works live after him.

W. M. Steele.
Louis Hanitch.
H. H. Grace.
E. L. Johnson.
D. E. Roberts.

Mr. Justice Marshall, on behalf of the court, responded:

The court welcomes your memorial and the accompanying remarks, assigning to the subject commemorated a high place in the judicial history of this commonwealth. The presentation, as we know the subject, is but a truthful, calm, moderate, portraiture of the personality and general conception of that altogether pure character,—the dignified, learned, able, discreet, lovable and loving man who was for many years, in large measure, the overshadowing governing force and first in the hearts of the people of a large portion of the state. All that has been said here will find an enduring place upon the records of this court with the fullest approval of those who vitalize its power. Too bad, it would be, had the memorial not come. It has been looked for, hoped for, and confidently expected. Though somewhat delayed, few circumstances of the kind, if any, have been characterized by more real merit. Sometimes a man of marked distinction because of his ability, the purity of public and private character, the high regard in which he was held within his environment, and the value of his life, in general, passes away and soon into oblivion, other than

within a narrow circle; while another,—though much less deserving,—because of circumstances characterizing his activities, particularly nearness to dominant centers of government and business,—promptly, and fully, and sometimes with exaggeration of significance,—is honored by a memorial, accompanied by eloquent tributes, being spread upon the public records. Too bad if such a character as that we are now contemplating were allowed to pass without some notable sign to perpetuate knowledge of his having lived and served his country with distinction in high station,—"speaking the law with an even mind and dispensing justice with an even hand, sitting serene and unmoved above the influence of fear and of faction," true to the maxim, *Fiat justitia, ruat cœlum.*

The memorial and remarks have so appropriately and fully proclaimed the significance as well as the general features of the life of him of whom we speak as to leave but little, if anything, which need be said in addition to fitting words of reception and approval. Yet he was so well known to some here, two of us having been members of the bar of his circuit, that this responsive effort may well go somewhat further and add declarative emphasis to the estimate of and respect for the upright life, which has come up to the court from the bar of the circuit where he was best known.

As already indicated, Judge CLOUGH was a well educated and trained lawyer of the old school,—a school which prepared candidates for the legal profession by inculcating the principles and logic of the law as a science. So, in his long judicial career, he was accustomed to test the situation created by the facts of a particular controversy by the legal principles appropriate thereto. In the beginning of his career, there were but few reported cases, and the habit of testing claimed rights by some similar situation previously judicially passed upon, and sense of uncertainty and helplessness as to the proper conclusion in the event of failure to find a satisfactory precedent, sometimes now observed, were practically unknown. Lawyers depended, in the main, upon knowledge of fundamental rules, laid down in recognized legal classics, and skill in marshaling facts and squaring them with such rules. The proved facts being arranged so as to tell, plainly, a client's story, some such basic truth was amply efficient for the rest, and needed but to be brought, understandingly, to the attention of the judge to settle the controversy. So a library of a few volumes was considered as helpful as one of a multitude of books today.

As the record of the memorial will perpetuate, Judge CLOUGH was circuit judge of the northwestern circuit of the state for twenty-four years, except for a short intervening incumbency. No one has occupied the bench there as long. In 1864, without personal solici-

tation, he was first a candidate for the place, and was easily elected. The break in his service came about by the legislature, well nigh on the morning of an election, having attached a county, in which he was a stranger, to his circuit. The people of the added territory soon repented of having been the means of displacing so competent an officer and, at the first opportunity, led the movement to restore him to his old position. Thereafter, he enjoyed universal support in his circuit until he chose, of his own judgment, to retire because of the amount of work to be done being overtaxing to his strength. The people reluctantly consented, but manifested their unbounded confidence in him by confidently referring to him for suggestion of a successor.

These words, pronounced in court at the threshold of the new incumbency to voice the estimate in which Judge CLOUGH was held as he passed into private life, cannot well be added to after the reflection and experience of years:

"Judge CLOUGH with the exception of a short interval, for twenty-four years, commencing in early manhood and extending well into the autumn of life, presided over the courts of this circuit, giving to the administration of justice such learning, such high appreciation of the important duties of the position, such careful attention to all the details of judicial labor, and, with all, such evident desire for all determinations to be the result of careful and impartial consideration, as to win for himself, with the bar and the people, the highest regard as an honorable, able, and just judge, which will ever be a significant crown in his retirement from the burdens which increased so as to exceed his strength. To win like reward in the case of his successor is worthy of the highest ambition. It is the general wish and hope that Judge CLOUGH has entered upon a long period of retirement which will fittingly round out his life with that restful enjoyment and contentment to which his long judicial labor so richly entitles him."

How gratifying it is to contemplate the full realization of the expressed wish and hope. The judge lived in most dignified, restful, contented, and happy retirement for more than twenty years, dearly beloved by those who were so fortunate as to come within his circle and highly respected by all, as of spotless character. With mind, clear, without diminution of the deep interest, characterizing the active period of his life, in the principles of the profession he loved, at last, with that pure face—mirror of the spirit—set in the fringe of white, like a rose in a snow bank, which early gave him the appearance of premature age, and, near by, a loved one of his own blood, who had been the solace of his declining years,

yet indulging, at times, in thoughts and converse of old friends, without special pain of body or mind,—except for the parting,—and with that calm resignation which had ever been characteristic of his life, he drifted down to the brink of the eternal river, where, as gently as the child falls asleep in the arms and soothed with the sweet lullaby of maternity, at an age far beyond that commonly given to man, he lapsed into the repose, called death, and the spirit took its flight into the unsolvable mysterious obscurity beyond,—the region we know so little of, yet the ultimate of our hope and love.

Worthily we may crown his memory with that poet's garland:

"Composed in suffering, in joy sedate,
Good without knowing, without pretense great,
True to his word, in every thought sincere,
He knew no wish but what the world might hear."

A few words from another angle may add a jewel of some magnitude to the memorial crown we place upon the record. Words spoken from a public standpoint, inspired by judicially restrained personal regard, are sometimes the truest measure of the most estimable side of a good man's character.

Few persons, if any, knew the subject of our thoughts as well and from as many viewpoints as myself. The duty of speaking to his memory, now, enables me in performing it, to indulge the impulse to decorate with heart-coloring the official remembrance. Moved by sweet memories of a long past, the mind yearns to thus give a setting to the picture of one of nature's noblemen,—one who taught a valuable lesson, day by day, by example and whose history is an inspiration to worthy attainments. That it was somewhat wrought into my own, creating moral obligations, in a sense, needs no confession. Beautiful flowers, in memory of him, line the pathway of an uninterrupted friendship spanning the greater part of the long life that has gone and the one substantially entering upon its closing period. No one knocked oftener than I at the door of justice where he sat enthroned or with greater confidence that it would be opened to merit, and to merit only, by a hand "unaffected by fear, favor, or hope of reward, by personal influence or public opinion." Truly it may be written of him, as of the great Chief Justice on the beautiful monument near by:

"His name is a synonym of justice, integrity, truth, and honor. These were the virtues which illumined his character. Radiant as the sunlight, shining as the stars."

I was schooled in his school. When infirmity of body and multiplication of judicial responsibilities, impressed him with a duty

to ask the people for consent to have one of stronger and younger hand bear up the scales of justice, it was upon my shoulders, with his blessing, that he chose and was permitted to place his mantle, and his confidence and watchfulness in retirement was an inspiration to preserve that mantle in the spotless purity in which it was received and pass it on in succession. With the longing heart of one looking backward from near the border line of the winter of life, and constantly made to appreciate its rapidly narrowing circle, memory marks a pause before the mental picture in our thoughts and we involuntarily project into the shadows that sweet refrain:

"O for the touch of a vanished hand,
And the sound of a voice that is still."

May we all hope to reach the high standard of fidelity and worth of him whom we now honor; that sometime,—however quickly that time may come,—it can be said of us as we say of him, particularly in respect to that warmth of personal regard which lends to life its choicest charm:

"He leaves behind him, free from grief and years
Far worthier things than tears,
The love of friends, without a single foe,
Unequaled lot below."

# CASES DETERMINED

AT THE

# August Term, 1913.

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JANES, Appellant, vs. CITY OF RACINE and others, Respondents, and RACINE WATER COMPANY, Appellant.

*October 10—October 28, 1913.*

*Public utilities: Purchase by city: Procedure: Statutes construed: Submission to electors: Form of question: Ratification: Manner of voting: Voting machines: Constitutional law: Compensation: Providing fund in advance: Limit of indebtedness: When debt is incurred: Levy of annual tax: Issuance of bonds: Railroad commission: Duties: Waterworks: Extensions ordered after vote to purchase: Estoppel: When title passes.*

1. Ch. 665, Laws of 1907 (secs. 927—11 to 927—19, Stats.), and the Public Utility Law (secs. 1797*m*—1 to 1797*m*—109, Stats.), do not, supplementing each other, furnish a single complete method for the acquiring of public utilities by municipalities, but each in itself provides a complete procedure for that purpose in the cases to which it applies; and each of said statutes is independent of the other. In a proceeding by a city to acquire a waterworks plant pursuant to the Public Utility Law, it was not necessary, therefore, to comply with the requirements of ch. 665, Laws of 1907.
2. The primary purpose of said ch. 665, Laws of 1907, was to enable cities to construct or purchase plants by the issue of mortgage certificates, though bonds and cash were also included to make it more elastic; and it seems peculiarly adapted to situations where the amount to be raised can be definitely ascertained in advance.
3. The common council of defendant city voted to submit to its electors "the question of purchasing the Racine Water Company plant," but did not otherwise direct the form of question or manner of submission. The city clerk prepared a notice of election in which the question to be voted upon read: "Shall the city of Racine purchase its waterworks?" and this was the form in fact submitted. *Held* that, whether or not

the clerk had power to determine the form of the question, a resolution adopted by the common council after the election, reciting that the city had by a majority vote of the electors determined to buy the property of the Racine Water Company, amounted to a ratification of his act.

4. The evidence in such case not disclosing that there was more than one waterworks plant in Racine, the voters were not misled and the question was properly submitted.

5. It being entirely within the discretion of the legislature to grant or withhold from the electors of a municipality the right to vote on the subject of the purchase of waterworks, it might, in granting such right, attach to it the reasonable condition that the vote should be taken in the manner prescribed by law, namely, by voting machines such as are authorized by secs. 44—1 to 44—18, Stats.; and it is immaterial whether such method is or is not a vote "by ballot" as prescribed by sec. 3, art. III, Const.

6. No fund need be provided beforehand to pay for property taken by a municipal corporation for public use, because the taxable property of the municipality constitutes a sufficient fund or pledge for the making of the just compensation contemplated by the constitution (art. I, sec. 13).

7. The acquisition by a city of the property of a public utility operating under an indeterminate permit, pursuant to the Public Utility Law, is not a condemnation but a purchase under the terms and conditions prescribed by that act, as supplemented and safeguarded by the constitution. To this the public utility agrees, as it is competent to do, by acceptance of an indeterminate permit.

8. A debt is not incurred within the meaning of sec. 3, art. XI, Const., until its amount is ascertainable, because until then it is impossible to apply the test required by the constitution, namely, the ratio between the indebtedness of the municipality and the last assessed valuation. *Crogster v. Bayfield Co.* 99 Wis. 1, distinguished.

9. In the acquisition of an existing plant by a city under the Public Utility Law, no debt is incurred by the city, within the meaning of sec. 3, art. XI, Const., when the vote to purchase is taken, but only when the price and terms become fixed by the filing of the certificates of the railroad commission and the exclusive use of the property, and presumably the title, vest in the municipality.

10. The affirmative vote by the electors of a city upon the question of purchasing waterworks which are being operated under an indeterminate permit does not immediately put an end to

such permit or franchise. *Appleton W. W. Co. v. Railroad Commission*, 154 Wis. 121, explained.

11. When the railroad commission files its certificate and the exclusive use of the plant is transferred to the city, if payment is not then made interest must be allowed in order that the purchase price shall constitute just compensation.

12. Where a city proceeds under the Public Utility Law to acquire an existing plant, sec. 3, art. XI, Const., requires that it shall, before or at the time of doing so, provide for the collection of a direct annual tax to pay therefor; and it was not necessary that the statute should contain any specific direction on that subject.

13. Under the Public Utility Law as it stands, it becomes the duty of the railroad commission, after it has determined the amount of the purchase price and the terms and conditions of the sale, to notify the municipality of the result of its action and to give it a reasonable time after such notice and before the certificate is filed to provide for the direct annual tax which the constitution prescribes.

14. Upon such notice, it becomes the duty of the municipality within such reasonable time to comply with the constitutional provision.

15. If, in view of the terms and conditions of sale imposed by the railroad commission, it becomes necessary for the municipality to issue bonds, it can do so without any further vote of the electors, since their vote to purchase the utility must be held to include a vote to raise money by the issuance of bonds if that method be deemed necessary or expedient by the common council.

16. Public health and convenience, as well as the statute, require that a public utility shall give adequate service, and such service must continue during the interval between the city's election to purchase and the time when the transaction is finally concluded by the filing of the certificate by the railroad commission. No estoppel, therefore, against the city to consummate the proceedings arises from the fact that it orders extensions of the utility plant after voting to purchase it.

17. Up to the time the certificate of the railroad commission is filed, the plant which a city proposes to purchase is the property of the public utility, and the city must pay for it as it exists at the time it is turned over.

APPEALS from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action begun November 30, 1912, by a taxpayer to declare void the proceedings already taken by the city of *Racine* for its acquisition of the plant or property of the *Racine Water Company,* and to enjoin both the city of *Racine* and the *Racine Water Company* from further prosecuting such proceedings and the city of *Racine* from incurring further expense therein.

On the 20th day of June, 1908, the *Racine Water Company,* which had previously operated under a franchise granted to it by the city of *Racine* on the 18th day of March, 1886, and effective for twenty-five years, accepted an indeterminate permit under the provisions of the Public Utility Law of this state (secs. 1797*m*—1 to 1797*m*—109, inclusive, Stats. 1911: Laws of 1907, ch. 449).

On the 7th day of February, 1911, the common council of the city of *Racine* adopted the following resolution: "Resolved, that the question of the city's purchasing the *Racine Water Company* plant be submitted to a vote of the people at the coming spring election." The resolution was published in the official paper of the city of *Racine* as a part of the council proceedings prior to the election held in said city in the month of April, 1911, and the question of the purchase of the plant was discussed in the public press of the city and among the voters before said election. Thereafter the city clerk, without any specific direction by the city council, prepared a notice of election, which was duly published, and the question submitted to the voters was as follows: "Shall the city of *Racine* purchase its water works?"

At the election the voting was done by the use of voting machines, pursuant to the provisions of ch. 459, Laws of 1901, as amended by ch. 495, Laws of 1905. The result of the election showed that 2,526 voted Yes and 466 voted No upon the question. The questions required by ch. 665, Laws of 1907, were never submitted to the voters of the city nor

has the city of *Racine* ever complied with any of the provisions of ch. 665.

On the 2d day of May, 1911, the city of *Racine* adopted a resolution wherein it recited, "Whereas, the city of *Racine,* by a vote of a majority of the electors voting thereon at the regular municipal election held in said city on the 4th day of April, 1911, at which election the question of the purchase of the water works plant was submitted to a vote of the electors of said city, determined to purchase the Racine water works plant," and wherein it provided for giving of notice to the *Racine Water Company* of its determination to acquire the company's property in accordance with the provisions of secs. 1797*m*—79 to 1797*m*—86, inclusive, of the Statutes of 1911. Thereafter due notice was given to the *Racine Water Company* and the railroad commission of the state of Wisconsin as required by the Public Utility Law.

At the time of the adoption of the resolution of May 2, 1911, the city of *Racine* had not, nor has it since, levied any tax, issued or provided for issuing any bonds, or otherwise provided any fund for the payment for the plant of the *Racine Water Company* or any means of obtaining such fund aside from the general provisions of law upon that subject, nor had the city either by its common council or by its electors determined in any manner how or when the plant should be paid for. Subsequently, and pursuant to a request by the city, the railroad commission of Wisconsin proceeded to make an *ex parte* and tentative valuation of the property of the *Racine Water Company* actually used and useful for the convenience of the public, which tentative valuation was fixed by it at the sum of $775,347. This tentative valuation included nothing for the going value of the plant, for certain service pipes extending from the street mains to the curb lines, nor did it include any extensions to the water-distributing system ordered by the common council between April 4, 1911, and January 1,

1912. The *Water Company* rejected such tentative valuation and refused to accept it as a basis of the acquisition of said plant by the city, whereupon the railroad commission gave notice to the *Racine Water Company* and the city of *Racine* that it would on the 1st of April, 1912, proceed to hear testimony to determine the value of said property and the just compensation to be paid therefor by the defendant city, and the terms and conditions upon which the same should be taken over and acquired by the city, which said proceeding is still pending before said railroad commission undetermined.

In April and May, 1911, the assessed valuation of the taxable property of the city of *Racine* was $24,464,231. For 1911 the assessed valuation of the city of *Racine* was $26,596,004. In 1912 the value of all taxable property in said city, as made by the assessment officers thereof, was $26,552,448, but upon a revaluation made pursuant to law by the tax commission of Wisconsin, completed on or about the 8th day of February, 1913, the entire assessed valuation of all taxable property of said city was fixed at $50,427,243. Between the 1st day of May, 1911, and the 30th day of November, 1912, the outstanding bonded indebtedness of the city of *Racine* ranged from $664,000 to $744,000. In addition to its bonded indebtedness it owed on April 4, 1911, the sum of $31,533.50.

Since the 4th day of April, 1911, the city has ordered and required the company from time to time to extend and enlarge its water-distributing system and has required it to expend in so doing the sum of $46,986.32. In June, 1913, at the time of the trial, the company had under consideration further additions and extensions ordered by the city, the estimated cost of which when completed will be $22,172.90. The company has also during said time made other necessary additions and extensions to its water plant at a further cost of $51,064.86.

Under its charter the city had power to levy a tax not exceeding three and one-half per cent. of the assessed value of its real and personal property. The amount of taxes required to be levied annually for city, county, and school taxes, and for customary municipal purposes, was about two per cent. of the assessed value of its property.

The trial court held:

"That the election of April 4, 1911, and the notice given of said election and the notice given of the submission at such election of the question of the purchase by the city of *Racine* of its water works were in all respects valid and sufficient for the purpose of submitting to the voters of the question of the purchase of the plant and property of *Racine Water Company* actually used and useful for the convenience of the public, and that no notice of vote pursuant to ch. 665, Laws of 1907, was necessary before instituting proceedings before the railroad commission for a valuation of said property under the Public Utilities Act.

"That the use of said voting machines for the purpose of said referendum was not unconstitutional, but the said vote was taken according to law.

"That it was not necessary for the city of *Racine,* before the commencement of proceedings for said purchase or before the determination of the railroad commission of the terms and conditions of sale, to raise the money for said purchase or to make provision by levying taxes or issuing bonds therefor.

"That it does not appear that the city of *Racine* would not be able to comply with the terms and conditions of purchase which may be fixed by the railroad commission.

"That it does not appear that in order to comply with the terms and conditions of purchase to be fixed by the railroad commission the city will exceed the constitutional limit of indebtedness.

"That the city of *Racine* is not estopped, by ordering and causing extensions to be made, from continuing and going on with said proceeding before the railroad commission.

"That the plaintiff was not guilty of such laches as would prevent the bringing of this action.

"That under the facts stipulated and proved the plaintiff has no cause of action and that the same should be dismissed with costs."

From a judgment entered accordingly, the plaintiff, and the defendant the *Racine Water Company,* which filed both an answer and a cross-complaint in which it asked for substantially the same relief as the plaintiff, appealed.

For the appellant *Janes* there was a brief by *Simmons & Walker;* for the appellant *Racine Water Company* there were briefs by *Kearney, Thompson & Myers;* and the cause was argued orally by *John B. Simmons* and *Thomas M. Kearney.* They contended, *inter alia:* (1) It is the constitutional right of every one whose property is taken for public use to have the compensation therefor paid or, in case a municipal corporation is the taker, to have an adequate fund provided by law for such payment, at the time of or prior to the actual taking. *Powers v. Bears,* 12 Wis. 214; *Loop v. Chamberlain,* 20 Wis. 135; *Sherman v. M., L. S. & W. R. Co.* 40 Wis. 645; *Brock v. Hishen,* 40 Wis. 674; *Smeaton v. Martin,* 57 Wis. 364, 15 N. W. 403; *State ex rel. Andrews v. Oshkosh,* 84 Wis. 548, 54 N. W. 1095; *Norton v. Peck,* 3 Wis. 471; 2 Lewis, Em. Dom. (2d ed.) 452, 453*a;* 15 Cyc. 645; *Rent v. Emery,* 173 Mass. 455, 53 N. E. 910. The only statute making such provision is ch. 665, Laws of 1907, passed contemporaneously with the Public Utilities Law and evidently intended to supplement it. Said ch. 665 allows an intelligent vote by the electors at the same time upon both the purchase of a plant and the manner of payment, and its provisions should have been complied with. (2) The duty of formulating a question for submission to the electorate and directing the manner as well as the time of submission is legislative in character and, if not performed by the legislature itself, rested with the common council and not with the clerk; and the particular question submitted was not only unauthorized but was misleading and not in compliance with the

statute which requires submission of the purchase of a *specific* plant. It did not refer to the plant of the *Racine Water Company* at all and may well have been understood by the voters as meaning, Shall the city acquire its own water works? The statute should be followed with reasonable strictness and the property to be taken should be accurately described so as to make the contract mutual and enforceable by the *Water Company*. *Austin v. Allen,* 6 Wis. 134; *Babb v. Carver,* 7 Wis. 124; *Koller v. La Crosse,* 106 Wis. 369, 82 N. W. 341; *State v. Logue,* 73 Wis. 598, 41 N. W. 1061; *Strang v. B. & M. R. Co.* 16 Wis. 666; *Isham v. Smith,* 21 Wis. 32; *People ex rel. Darnell v. Hamilton Co.* 3 Neb. 244; *Athens v. Hemerick,* 89 Ga. 674, 16 S. E. 72; *Crooke v. Daviess Co.* 36 Ind. 320; *Yarish v. C. R., I. F. & N. W. R. Co.* 72 Iowa, 556, 34 N. W. 417; *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101; *Ashland v. N. P. R. Co.* 119 Wis. 204, 96 N. W. 688. (3) The use of voting machines violated the constitutional provision that all elections must be "by ballot." *State ex rel. Runge v. Anderson,* 100 Wis. 523, 76 N. W. 482; *State ex rel. Briesen v. Bardeen,* 77 Wis. 601, 46 N. W. 899; *Opinion of Justices,* 178 Mass. 605, 60 N. E. 129; *Nichols v. Minton,* 196 Mass. 410, 82 N. E. 50; *People ex rel. Deister v. Wintermute,* 194 N. Y. 99, 86 N. E. 818; *State ex rel. Karlinger v. Board, etc.* 80 Ohio St. 471, 89 N. E. 33; *State v. Miller,* 87 Ohio St. 12, 99 N. E. 1078, 1084. (4) The vote, if valid, would amount to an acceptance of the city's option to purchase, existing by virtue of the indeterminate permit, and would therefore create an immediate obligation or debt on the part of the city. *Appleton W. W. Co. v. Railroad Commission,* 154 Wis. 121, 142 N. W. 476; *Cherryvale W. Co. v. Cherryvale,* 65 Kan. 219, 69 Pac. 176; *Bristol v. Bristol & W. W. W. Co.* 25 R. I. 189, 55 Atl. 710; *Braintree W. S. Co. v. Braintree,* 146 Mass. 482, 16 N. E. 420; *Rockport W. Co. v. Rockport,* 161 Mass. 279, 37 N. E. 168; *Galena W. Co. v. Galena,* 74 Kan. 644, 87 Pac. 735;

*Crogster v. Bayfield Co.* 99 Wis. 1, 74 N. W. 635, 77 N. W. 167; *Earles v. Wells,* 94 Wis. 285, 298, 68 N. W. 964; *Culbertson v. Fulton,* 127 Ill. 30. (5) Because such indebtedness would exceed the constitutional limit of five per cent. of the *then* assessed value of the taxable property of the city, the city was without power to buy and the vote was of no effect. *Crogster v. Bayfield Co., supra.* (6) The city waived its right to purchase by ordering extensions after the vote was taken. *Rockport W. Co. v. Rockport, supra; Bristol v. Bristol & W. W. W. Co., supra; Galena W. Co. v. Galena, supra.* (7) The law must be interpreted in the light of the constitution. It provides the same procedure in cases where the utility has *not* accepted an indeterminate permit as where it has, except as to the trial by jury of the question of necessity. Hence no other constitutional rights are waived, and the railroad commission can impose no "terms or conditions" which invade such rights.

*E. R. Burgess* and *Burr W. Jones,* for the respondents, contended that sec. 1797*m*—80, Stats. 1911, governed in respect to the submission of the question of purchase to the electors; that it was complete and sufficient in itself; and that ch. 665, Laws of 1907, was an independent statute, the main purpose of which was to provide for the construction or purchase of plants by the use of mortgage certificates. *Appleton W. W. Co. v. Appleton,* 116 Wis. 363, 93 N. W. 262. The use of voting machines was legal. *Henshaw v. Foster,* 26 Mass. 312; *In re Voting Machine,* 19 R. I. 729, 36 Atl. 716; *Detroit v. Board of Inspectors,* 139 Mich. 548, 102 N. W. 1029; *Henderson v. Board of Elec. Comm'rs,* 160 Mich. 36, 124 N. W. 1105; *Elwell v. Comstock,* 99 Minn. 261, 109 N. W. 698; *Lynch v. Malley,* 215 Ill. 574, 74 N. E. 723. The statute imposed no condition requiring the ability of the city to buy to be determined, or the funds to pay for the plant to be provided, in advance of a valuation; and the *Water Company* by accepting an indeterminate per-

mit accepted the provisions of the statute. *In re Cedar Rapids,* 85 Iowa, 39, 51 N. W. 1142. When the valuation is completed, the duty of the city to pay by the levy of a tax or the issue of bonds is just as imperative as if the mandate had been written in the law. *Smith v. Gould,* 59 Wis. 631, 18 N. W. 457; *State v. Hogue,* 71 Wis. 384, 36 N. W. 860; *State ex rel. Burbank v. Superior,* 81 Wis. 649, 51 N. W. 1014; *Haubner v. Milwaukee,* 124 Wis. 153, 101 N. W. 930, 102 N. W. 578; *Williams v. Parker,* 188 U. S. 491, 23 Sup. Ct. 440; Lewis, Em. Dom. § 679. The proceeding is not a condemnation but a purchase, and the *Water Company* by accepting an indeterminate permit has waived the objections now urged. *Appleton W. W. Co. v. Railroad Commission,* 154 Wis. 121, 142 N. W. 476. It would be impossible to provide for the payment, by tax levy or otherwise, and hence there could be no debt, within the meaning of the constitution, until the price was ascertained. *Eau Claire v. Eau Claire W. Co.* 137 Wis. 517, 119 N. W. 555; *Kyes v. St. Croix Co.* 108 Wis. 136, 83 N. W. 637; *Eau Claire W. Co. v. Eau Claire,* 132 Wis. 411, 112 N. W. 458; *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk,* 96 Wis. 91, 71 N. W. 86; *Eau Claire W. Co. v. Eau Claire,* 127 Wis. 154, 106 N. W. 679.

VINJE, J. Briefly summarized, the material contentions of appellants are: (1) The provisions of ch. 665, Laws of 1907, should have been complied with in acquiring the plant and in submitting the question of the purchase thereof to the voters; (2) the question of acquiring the plant was improperly submitted to the voters, because (a) the city clerk had no authority to frame the question to be submitted, and (b) the question as framed was misleading; (3) the vote was illegal because voting machines were used; (4) the city should have provided a fund for the payment of the plant before the vote to purchase was taken; (5) the city's constitutional limit of

indebtedness was or will be exceeded by the purchase; (6) the city has not and cannot comply with the constitutional requirement that before or at the time of incurring any indebtedness it shall provide for the collection of a direct annual tax sufficient to pay the same as therein provided; and (7) the city, by reason of ordering extensions to be made to the plant after it voted to purchase the same, is estopped from further prosecuting the proceedings.

1. Was it necessary to comply with the requirements of the provisions of ch. 665, Laws of 1907, in acquiring the plant and in submitting the question of the purchase thereof to the voters? If it was, then the proper proceedings were not taken, for ch. 665 requires that the resolution or ordinance authorizing the construction or acquisition of a plant shall prescribe the parts of the expense of such acquisition or purchase to be paid out of the general fund of the city, or from the proceeds of bonds issued pursuant to law, or from the proceeds of mortgage certificates, as therein provided. Sec. 927—12, Stats. 1911. It also requires that the notice of election for the acquisition or purchase of the plant shall state, among other things, the proposed manner of payment for the same. Sec. 927—14, Stats. 1911. And sec. 927—15 thereof provides that the form of the question submitted to the voters shall be substantially as follows: "Shall (designate plant, equipment or part thereof) be acquired or constructed and mortgage certificates ( (and) (or) bonds) be issued therefor? Yes ☐ No ☐." It will be observed from these requirements of ch. 665 and the proceedings taken by the city as set out in the statement of facts that ch. 665 was not complied with. Ch. 665 was approved July 16, 1907, and published the next day. The general Public Utility Law (ch. 499, Laws of 1907) was approved July 9, 1907, and published July 11, 1907. It is claimed by appellants that these two laws furnish but a single complete method of acquiring public utilities by cities, and that

they supplement each other. The respondents claim that they are independent acts and that proceedings may be had under the one or the other as they may apply to the situation confronting cities in the acquisition or construction of public utilities. Ch. 499, Laws of 1907, is the general Public Utility Act and is found in the Statutes of 1911 in ch. 87, entitled "Railroads," constituting secs. 1797*m*—1 to 1797*m*—109, inclusive, while ch. 665, Laws of 1907, is found in ch. 41 thereof, entitled "General Provisions Relating to Municipalities, Including Cities of Both Classes," and constitutes secs. 927—11 to 927—19, inclusive.

The provisions for acquiring a public utility under the general acts are found in secs. 1797*m*—80 to 1797*m*—86, with a curative provision added in 1911 as sec. 1797*m*—86*m*. They nowhere require, either in the resolution or ordinance of the council, in the notice of election, or in the question submitted, that the manner of providing the fund shall be specified. It is obvious that if ch. 665 applies to the acquisition of a public utility under secs. 1797*m*—80 to 1797*m*—86, inclusive, it must be reasonably adapted to apply to and meet the situations therein contemplated. For it is impossible to believe that the legislature, having under consideration both these acts at the same time and intending them to be supplementary to each other, should include provisions in ch. 665 that could not reasonably be complied with in the acquisition of a public utility under the general act. And yet, if the acts are supplementary, that is just what the legislature did. By the general act the railroad commission must fix the amount of property to be purchased, the price thereof, and the terms and conditions of the payment. Sec. 1797*m*—82. Until this is done the city cannot know what amount of money it must pay for the plant nor the terms and conditions of the payment. Such determination cannot be made by the railroad commission until after the city is required to act both by its council and its electors.

It would therefore be unreasonable to require the city council and the voters to determine what part of the expense should be paid out of the general fund, what part from the proceeds of bonds, and what part from the proceeds of mortgage certificates, before they knew the amount to be raised. True, the word "part" denotes proportion or ratio merely and not absolute amount. But it does not seem reasonable to require a city to determine in what proportion it will raise funds before it knows the amount of funds to be raised. Moreover, the railroad commission must fix the terms and conditions of the sale, and they may be important factors in properly determining how the funds shall be provided. But that ch. 665 contemplated that the amount of money to be raised was known before the city was required to act, and that the amount of each *part* should be specified in the resolution, or ordinance, notice of election, and question to be submitted to the voters, is rendered almost certain by the language of sec. 927—17, which requires the mayor and clerk of the city, in case mortgage certificates are called for in the ordinance or resolution, notice of election, and question submitted to the voters, to issue mortgage certificates *"for the purpose and to the amount stated."* The words *amount stated* can refer only to the amount stated in such ordinance or resolution, notice of election, and question submitted to the voters.

Ch. 665 furnishes in itself a complete procedure for acquiring a public utility in cases where it is applicable, and so does the general Public Utility Act. Neither refers to the other. Each uses expressions equivalent to "as herein provided," and does not seem to contemplate the aid of supplementary statutes in completing the proceeding. The language of sec. 1797*m*—81 to the effect that if the city shall have determined to acquire an existing plant "in the manner provided in the preceding section," clearly indicates that no other procedure than that contained in the section referred to was in the legislative mind. So the language in sec.

927—11 that any city may construct or acquire a plant "as herein provided," and that it must comply with certain specified requisites before it does so "under this section," clearly indicates that ch. 665 was considered complete and independent by the legislature. It required the question of purchase to be submitted to the voters. The Public Utility Law as first enacted did not so require, but was amended in 1911 so as to require it. No reference in such amendment was made to ch. 665, and if all proceedings had to comply with the latter no amendment was necessary.

A careful study of ch. 665 leads to the conclusion that the primary purpose of its enactment was to enable cities to construct or purchase plants by the issue of mortgage certificates. Bonds and cash were also included to make it more elastic. It seems peculiarly adapted to the construction or acquisition of plants under sub. 1 and 2 of sec. 1797*m*—79, which provide for the construction, equipment, and operation of a plant by a municipality, and the purchase of any part of any plant by an agreement with a public utility, respectively. Both deal with situations where the amount to be raised can be definitely ascertained. The procedure of the general Public Utility Act seems more applicable to the acquisition of a plant under sub. 3 and 4 of said sec. 1797*m*—79, which provide, respectively, for the acquisition of a plant by condemnation and by purchase pursuant to the Public Utility Law, where the amount to be raised cannot be definitely ascertained until long after the municipality is required to vote on the subject.

The conclusion reached is that the city properly began proceedings under the general Public Utility Law, and that it was not necessary to comply with the provisions of ch. 665, as that is an independent act.

2. Was the question of acquiring the plant improperly submitted to the voters? The city council passed a resolution providing for the submission to the voters of the question

of "purchasing the *Racine Water Company* plant." It appears that the city council did not determine in what particular form the question should be submitted to the voters, nor direct the city clerk to prepare the question. The latter, however, prepared a notice of election announcing that the question, "Shall the city of *Racine* purchase its water works," would be voted upon at the ensuing spring election, and such was the form of the question voted upon.

Appellants claim (a) that the city clerk had no right to determine the form of the question, that being the duty of the council, and (b) that the form of the question was misleading, and was not equivalent to a vote upon the question of whether the city should purchase the *Racine Water Company's* plant. It is needless to consider or determine the power of the city clerk, in the absence of any directions from the council, to prepare the form of the question, for it appears that on the 2d day of May, 1911, the council passed a resolution reciting that the city of *Racine* by a vote of the majority of the electors voting thereon had determined to purchase the Racine water works plant. The passage of such a resolution with knowledge of all the facts was a ratification of the city clerk's acts in preparing the question for the voters. What the council could do in the first instance respecting this matter it could subsequently ratify.

The claim that the voters were misled by the form of the question is not well founded. The evidence fails to disclose that there was more than one water works plant in *Racine,* and in view of the public discussion of the question previous to election of the purchase of the *Racine Water Company's* plant, as found by the court, it must be apparent that such plant was meant and understood by the question "Shall the city of *Racine* purchase its water works?" No voter was misled. There was only one plant subject to purchase, and that was the one in fact voted for, namely, the *Racine Water Company's* plant.

In *State ex rel. Elliott v. Kelly,* 154 Wis. 482, 143 N. W. 153, it was held that a vote for the office of "chamber of commerce" was a vote for the office of "superintendent of trade and commerce," because the voters were not misled by the difference in terms. The reasons for holding that no one was misled are much stronger in this case.

3. The question of whether or not votes cast by means of voting machines are votes "by ballot" within the meaning of sec. 3, art. III, of the constitution, which requires that "All votes shall be given by ballot except for such township officers as may by law be directed to be otherwise chosen," is an interesting one. The Massachusetts court divided on it. See *Opinion of Justices,* 178 Mass. 605, 60 N. E. 129. Their constitution, however, requires that the voting, there construed, should be by "written vote." Michigan, in *Henderson v. Saginaw Elec. Comm'rs,* 160 Mich. 36, 124 N. W. 1105; Illinois, in *Lynch v. Malley,* 215 Ill. 574, 74 N. E. 723; and Minnesota, in *Elwell v. Comstock,* 99 Minn. 261, 109 N. W. 113, 698, have held votes by voting machines valid under constitutional provisions similar to our own, while Ohio, in *State ex rel. Karlinger v. Board,* 80 Ohio St. 471, 89 N. E. 33, and reaffirmed in *State ex rel. Weinberger v. Miller,* 87 Ohio St. 12, 99 N. E. 1078, held them void.

We deem it unnecessary to decide the question in this case, for the reason that it was entirely within the discretion of the legislature to grant to or withhold from the electors the right to vote on the subject of the construction or acquisition by a municipality of water works. Having granted the right, it could attach to it the reasonable condition that the vote should be in the form prescribed by statute. Secs. 44—1 to 44—18, Stats. 1911, provide for the use of voting machines. It does not appear that any of the requirements therein contained were violated. Hence it must be held that a valid vote was had on the question of the purchase of the plant.

4. The contention that sec. 13, art. I, of the constitution, providing that "the property of no person shall be taken for public use without just compensation therefor," required the city to provide a fund for the payment of the plant before voting to purchase, is untenable for two reasons. In the first place, conceding for the purposes of the argument that the taking of the vote was an election to condemn, the rule that a fund must be provided beforehand for the payment of the property taken does not apply to municipal corporations, because it has been held that the taxable property of the municipality constitutes a sufficient pledge or fund for the making of the just compensation contemplated by the constitution. *Smeaton v. Martin,* 57 Wis. 364, 15 N. W. 403; *Smith v. Gould,* 59 Wis. 631, 18 N. W. 457; *State v. Hogue,* 71 Wis. 384, 36 N. W. 860; *Kimberly & C. Co. v. Hewitt,* 79 Wis. 334, 48 N. W. 373; *State ex rel. Burbank v. Superior,* 81 Wis. 649, 51 N. W. 1014; *Haubner v. Milwaukee,* 124 Wis. 153, 167, 101 N. W. 930, 102 N. W. 578. That the taxable property of the municipality is liable for any valid debt created by it is guaranteed by the mandate of the constitution itself requiring the levy of a direct annual tax sufficient to pay the principal and interest within twenty years. Sec. 3, art. XI.

In the second place, the acquisition of the plant by the city is not a condemnation but a purchase under the terms and conditions prescribed by the Public Utility Law. Sec. 1797*m*—78 provides:

"Any public utility accepting or operating under any license, permit or franchise hereafter granted shall, by acceptance of any such indeterminate permit, be deemed to have consented to a future purchase of its property actually used and useful for the convenience of the public by the municipality in which the major part of it is situate for the compensation and under the terms and conditions determined by the commission, and shall thereby be deemed to have waived the right of requiring the necessity of such taking to be es-

tablished by the verdict of a jury, and to have waived all other remedies and rights relative to condemnation, except such rights and remedies as are provided in secs. 1797*m*—1 to 1797*m*—109, inclusive."

By accepting the indeterminate permit the *Racine Water Company* stipulated to sell its property to the city under the terms and conditions contained in the Public Utility Act as supplemented and safeguarded by the constitution of the state. This it was competent to do, and this it did by accepting an indeterminate permit. We are therefore called upon only to see that the provisions of such act and of the constitution are complied with in the making of the purchase.

5. Appellants claim that two constitutional provisions, found in sec. 3, art. XI, incapacitate the city from making the purchase. The first reads: "No . . . city . . . shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." The second provides: "Any . . . city . . . incurring any indebtedness as aforesaid shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." Their claim is that when the city voted to purchase the plant on April 4, 1911, it incurred the indebtedness within the meaning of the first constitutional provision above quoted, though the amount of the indebtedness remained to be determined later by the railroad commission. At the time the vote was taken the previous assessment of the city was $24,464,231; its indebtedness was $664,000. The tentative value of the plant was fixed at $775,000. If the tentative value of the plant be taken as the amount of the debt, then

that amount, added to the indebtedness of the city, would exceed five per centum of the assessed valuation by over $200,000, and the city could not lawfully make the purchase if the debt is held to be incurred when the city votes to buy.

The method of acquiring a public utility under the statute is a complex one. Between the time the option to purchase is exercised by the city and the time it takes actual possession of the acquired utility a considerable period of time must necessarily elapse and much work must be done by the railroad commission. It is given a year in the first instance within which to complete its labors after notice is served upon it by the city. Sec. 1797*m*—82. The proceeding is *sui generis*, and but little aid can be had from adjudicated cases in determining when, under the provisions of the statute, the city incurs the indebtedness within the meaning of the constitutional provision first above referred to. It is evident that at the time the vote is taken to acquire the plant only a rough guess or estimate can be made of the total amount that may finally have to be paid therefor, because, pursuant to the law, the railroad commission must determine the quantum of property to be taken, the price to be paid therefor, and the terms and conditions under which the purchase price shall be paid. And sec. 1797*m*—82 says: "The compensation and other terms and the conditions of sale and purchase thus certified by the commission shall constitute the compensation and terms and conditions to be paid, followed, and observed in the purchase of such plant from such public utility;" and further, "Upon the filing of such certificate [containing the price and terms of sale] with the clerk of such municipality the exclusive use of the property taken shall vest in such municipality." It is evident from this language of the statute that up to the time the certificate is filed the public utility exercises full control over its property the same as it did before the city elected to purchase. The statute nowhere prescribes when the title to the property shall vest in the munici-

pality. But it is evident from the provisions of the act taken collectively as well as from specific language in particular sections that the transaction for the purchase of the plant is not deemed complete in all its essential details until the railroad commission files its certificate. Then the exclusive use of the plant is transferred to the municipality, and if payment is not then made interest must be allowed in order that the purchase price shall constitute just compensation. *Appleton W. W. Co. v. Railroad Commission,* 154 Wis. 121, 142 N. W. 476. Up to that time the public utility exercises full control over its property the same as it did before the city elected to purchase. It is true that in the *Appleton Case, supra,* the court said: "The moment the municipality exercises its option to purchase the plant of a public utility operating under such a permit [an indeterminate one] the life of such permit is terminated, and henceforth the same possesses no more value than a franchise for a definite term of years upon the expiration of the term." But that was stated with reference to the question of whether or not the public utility should be allowed compensation for the alleged value of the indeterminate permit. It was not thereby intended to determine or fix the precise time the city incurred a debt in the purchase of a public utility. The language used was apt and appropriate to the subject then discussed by the court, but it has little relevancy to the question now under consideration.

In a case where the probable value of the plant intended to be purchased, together with the indebtedness of the city, approximates or slightly exceeds the constitutional amount of indebtedness a city may incur, it can never be accurately determined until the railroad commission files its certificate whether or not the five per centum limit of indebtedness is exceeded. To hold that the amount of the purchase price when ascertained by the railroad commission relates back and constitutes an indebtedness from the time the vote is taken

might in many cases result in invalidating obligations apparently lawfully incurred by the city during the interval that elapses between the time the vote is taken and the time the railroad commission fixes the amount of the purchase price. Moreover, it would result in holding the city presently indebted for a plant which is still being operated by a public utility, and which in all probability will continue to be so operated for a considerable length of time, the profits of which operation will accrue to the public utility. On the other hand, if it be held that the indebtedness is incurred, and the obligation to pay becomes fixed, when the certificate is filed, and when the exclusive use of the property, and presumably the title also, vests in the municipality, then it can always be ascertained with exactness at the time the debt is incurred whether or not the constitutional provision above referred to is violated. Upon reflection it becomes plain that the amount of the debt must be ascertainable at the time the constitution requires the municipality to determine whether it has exceeded its constitutional limit of indebtedness, and that is at the time the debt is incurred.

In *Crogster v. Bayfield Co.* 99 Wis. 1, 17, 74 N. W. 635, 77 N. W. 167, the court says:

"The limit of such indebtedness, as fixed in the constitutional provision in question, is 'five per centum on the value of the taxable property' in the county, 'to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness.' The manifest purpose of ascertaining such value of the taxable property in the county by such 'last assessment' previous to the incurring of such indebtedness was to enable all parties to know in advance whether the debt so contracted was within or exceeded the constitutional limit. In the language of Mr. Justice Lamar, speaking for the whole court, in one of the cases cited: 'In this case the standard of validity is created by the constitution. In that standard two factors are to be considered,—one the amount of the assessed value, and the other the ratio

between that assessed value and the debt proposed.' *Lake Co. v. Graham,* 130 U. S. 683, 684, 9 Sup. Ct. 654. . . . As indicated in that opinion, the two standards of validity created by the constitution, to wit, the amount of such assessed value and the ratio between that 'value and the debt proposed,' are indispensable requisites, and must always be kept in mind in determining the validity of any such contract." Page 17.

In no case can the ratio between the assessed valuation and the indebtedness of the city, including the proposed debt, be determined until the amount of the proposed debt is known. Therefore it must be held that within the meaning of the constitution a debt is not incurred until its amount is ascertainable. Because until such amount is ascertainable it is impossible to apply the test required by the constitution, namely, the ratio between the indebtedness of the city and the last assessed valuation. It cannot be that such a test was intended to be applied before it was possible to do so. The constitution evidently contemplates that there should be a definite debt to which the test can be applied, and if there is no such definite debt it cannot be a debt within the meaning of the constitution. It is merely a debt *in fieri.* By a debt incurred the constitution means a debt whose ratio to the limit of indebtedness can be ascertained at the time it is incurred. At least it must follow that where the constitutional test cannot be applied it cannot be said the constitution is violated.

Our attention is called by appellants to a number of cases, some arising under statutory provisions and some under contracts, wherein it has been held that when a municipality agrees or contracts or elects under a statute to do a certain thing calling for the payment of money, an indebtedness is then incurred. Such cases are of little value in determining when a city incurs an indebtedness under the proceedings of the Public Utility Act. As before stated, the transactions

involved are many and are necessarily separated by long intervals of time, and it seems more logical and more in consonance with the legislative intent to hold that such indebtedness arises when the amount and terms thereof become fixed and the exclusive use of the property vests in the municipality, than to say that it is incurred at the initial step of the proceedings and long before the transactions are fully and finally consummated.

The case of *Crogster v. Bayfield Co.* 99 Wis. 1, 74 N. W. 635, 77 N. W. 167, is relied upon as authority for the proposition that the debt is incurred when the vote to purchase is taken. It will be seen in the *Crogster Case* that the county voted to issue $240,000 of bonds to aid in the building of a railroad. If both parties fulfilled their contract, the exact amount of the indebtedness was known when the vote was taken and the debt was held to be incurred. Not so in the instant case. Besides, in the *Crogster Case* the statutory provisions were different. That statute (sec. 945, R. S. 1878) expressly provided for the execution by the railroad company under its seal of a definite proposition in writing to be by it delivered to the municipality. All the terms and conditions were fixed. The next section provided two different ways in which the definite proposition might be accepted by the municipality "so as to become mutually obligatory;" one by signature, the other by an election. No matter in which way it was accepted, the statute declared that if accepted "then such proposition shall be deemed obligatory as a mutual agreement." We have no such statute under consideration in the present case. Quite the contrary appears, as has been indicated. The final consummation of the proceedings is not reached till the railroad commission files its certificate. Then the terms and the mutual agreement become fixed, then the public utility furnishes the consideration for the debt, and then the debt is created within the meaning of the constitution. *Merrill R. & L. Co. v. Merrill,* 80 Wis. 358, 49

N. W. 965; *Walla Walla v. Walla Walla W. Co.* 172 U. S. 1, 19 Sup. Ct. 77. The last assessment previous to the filing of such certificate will govern. Since the assessment of 1912 was over $50,000,000, it must be presumed that the city will not exceed its constitutional limit of indebtedness in purchasing the plant.

6. Can the constitutional provision requiring the city to provide for the collection of a direct annual tax to pay the indebtedness created by the purchase of the plant be complied with under the provisions of the statute? It is true the act nowhere contains any specific direction for its being done, nor any provision for doing it. There was no necessity for the statute providing that it should be done, for the constitutional requirement is paramount and must be read into the law, whether expressed therein or not. It would certainly, however, have been appropriate for the legislature to have provided in specific terms for the opportunity of the city to do so. Whether such omission was due to an oversight or to the fact that the legislature considered that by intrusting the proceedings to such an important state agency as the railroad commission ample opportunity would by it be given the city to comply with the constitution, is immaterial. Under the law as it stands it becomes the duty of the railroad commission, after it has determined the amount of the purchase price and the terms and conditions of the sale, to notify the city of the result of its action and to give it a reasonable time after such notice and before the certificate is filed to make provision for the collection of the direct annual tax required by the constitution. And upon such notice it likewise becomes the duty of the city, within a reasonable time, to comply with the constitutional provisions. And if, in view of the terms and conditions of sale imposed by the railroad commission, it becomes necessary to issue bonds to procure the purchase price, it can do so without any further vote of the electors. Their vote to purchase the plant must be held

to include a vote to raise money by the issuance of bonds if that method be deemed necessary or expedient by the city council.

7. No estoppel against the city to consummate the proceedings arises from the fact that it ordered extensions to the system after voting to purchase the plant. Public health and convenience, as well as the statute, require that such a public utility shall give adequate service. And such service must continue during the interval that elapses between the time the city elects to purchase and the time the transactions are finally concluded by the filing of the certificate. Up to that time the plant and property belong to the public utility, and the city must pay for the plant as it exists at the time it is turned over to it, so no injustice is done the utility by requiring it to continue to give adequate service during the time the proceedings are pending.

*By the Court.*—Judgment affirmed on both appeals.

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WHALEN, Respondent, vs. EAGLE LIME PRODUCTS COMPANY, Appellant.

WHALEN, Respondent, vs. EAGLE LIME PRODUCTS COMPANY and another, imp., Appellants.

*October 11—October 28, 1913.*

*Trial: Findings: Insufficiency: Appeal: Determination and disposition of cause: Mechanics' liens: Entire contract: Substantial performance: Preventing performance: Extra work: Actions: Consolidation.*

1. In an action to foreclose a mechanic's lien, where the complaint alleged that plaintiff was prevented from full performance by acts of the defendant, a finding that plaintiff failed to complete his contract, without any determination as to whether defendant was responsible for such failure, was defective.

2. Upon an appeal in such case from a judgment for plaintiff it becomes necessary for the supreme court to examine the evidence to ascertain whether the judgment is clearly supported by a preponderance thereof, and, if not so supported, to determine whether the preponderance is so clearly the other way that judgment for the defendant should be ordered, or whether there should be a new trial.
3. A contract to build a definite piece of railroad complete, doing all grading, surfacing, putting in all culverts, cattle passes, and road crossings, and laying the rails, furnishing all materials except rails, ties, fish-plates, angle bars, and spikes, and to have the work completed by a date named, for a specified sum to be paid in instalments upon engineer's estimates less fifteen per cent., is an entire contract, and without at least substantial performance there can be no recovery of an unpaid balance of the contract price.
4. When work to the amount of more than $3,000 remains to be done on a $10,000 contract, there is clearly a failure of substantial performance.
5. Upon the evidence in this case it is *held* that plaintiff was not prevented from completing his contract to construct a railroad by defendant's failure either to make the stipulated payments or to furnish the required materials.
6. Proof that men employed by plaintiff refused to work because defendant declined to guarantee their pay does not excuse nonperformance, since defendant was not obliged to do that.
7. The mere fact that plaintiff had done extra work to the value of $25 did not justify a recovery in an action upon an uncompleted entire contract, where he had already received over $5,000 in cash. The court should in such case apply $25 from the payments already made in discharge of that item.
8. Although plaintiff failed to complete an entire contract for building a railroad to defendant's manufacturing plant, nevertheless for work done by him at defendant's request in filling and grading around the plant, which was entirely independent of the building of the railroad, he is entitled to recover and to enforce a lien against such plant.
9. The question of consolidation of actions is always one of discretion with the trial court.

APPEALS from judgments of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *One judgment reversed; the other reversed in part.*

These are mechanics' lien actions, the first being brought

to foreclose a lien upon a railroad track and right of way six miles in length, running from the Chicago & Northwestern Railway station at Dousman, Waukesha county, southward to the manufacturing plant of the *Eagle Lime Products Company,* a corporation, and the second to foreclose a lien upon said plant and the lands upon which the buildings stand. The first action is against the corporation alone, the second against the corporation and *William H. Lindwurm,* who are alleged to be the owners of the plant, joining also as a defendant the Citizens Trust Company, a corporation, which is alleged to have a subsequent interest in or lien upon the plant. Both actions were referred to Charles H. Welch, Esq., as referee, and by consent they were tried together on the same evidence. The referee, after trial, made a single report covering both actions containing the following findings of fact and conclusions of law:

*"Findings of Fact.*

"That the plaintiff, *Joseph Whalen,* is a general contractor. That the defendant *Eagle Lime Products Company* is a corporation duly organized and existing under the laws of the state of Wisconsin. That on the 18th day of September, A. D. 1908, the plaintiff, *Joseph Whalen,* and the defendant *Eagle Lime Products Company* entered into a written contract, consisting of a proposition, acceptance and exhibits filed herein and marked 'Exhibit A,' wherein and whereby the said *Joseph Whalen* undertook to build a railroad upon the right of way owned by the *Eagle Lime Products Company,* said land and right of way being in the towns of Ottawa and Eagle, Waukesha county, Wisconsin, and described in detail in plaintiff's complaint, connecting defendant's plant with the Northwestern Railway at Dousman, Wisconsin. That defendant *Eagle Lime Products Company* was to furnish the rails, ties, fish-plates, angle bars and spikes to be used in the construction of said railroad, and was to put in the bridge at Scoopernong Creek. That the plaintiff was to construct the railway entirely complete, doing all grading, surfacing, putting in all culverts, cattle passes, road crossings, and laying of the rails; to furnish all material for culverts,

cattle passes and road crossings, and to do the work in a first-class workmanlike manner. That he was to have said work thoroughly completed in a satisfactory manner by the 15th day of December, A. D. 1908.

"That the contract price for said work was to be $10,650, to be paid upon estimates made every thirty days, the first estimate to be made thirty days from the beginning of the work and the amounts to be paid according to such estimates, minus fifteen per cent.

"That the plaintiff entered upon the performance of said contract and continued up to the 18th day of December, A. D. 1908. That prior to the 18th day of December, 1908, there had been delays in furnishing rails, ties, angle bars and fish-plates. That the plaintiff suffered damage by said delays in the sum of $200.

"That upon said 18th day of December the plaintiff had not completed the contract. That differences arose between the plaintiff and defendant company, the plaintiff claiming he had practically finished the work under the contract, and the defendant claiming that he had already paid plaintiff more than was due him for the work already done. That plaintiff refused to proceed further unless advanced more money. That after some negotiations an estimate was made by F. C. Blunt, an engineer of the Chicago & Northwestern Railway, who had been on the work of supervising engineer since its inception, in which Mr. Blunt found that it would require $3,700 to complete the work according to the contract. That plaintiff refused to accept the figures of the engineer, and subsequent to this time did no further work under the contract except a small amount of spiking in January, 1909; and ceased work entirely on January 25, 1909.

"That on December 26, 1908, the defendant company served notice on the plaintiff that he had not completed his contract according to the terms thereof, nor on the date fixed for its completion, to wit, December 15, 1908, and demanded that he complete said work without delay. That defendant further offered to waive the retaining of the fifteen per cent. and allow plaintiff to receive a balance at that time of $1,556.60 with which to meet the payments for labor and complete the work. Defendants also expressed themselves willing, if sufficient work could be completed during the

present season, and for which the engineer had estimated that $3,700 be withheld, to advance and pay for such uncompleted work, or any portion which was completed and done to the engineer's approval. That plaintiff still failed and neglected to proceed with the completion of the contract, and upon the first day of February defendant served upon the plaintiff notice that owing to his neglect they were obliged to take in charge the construction of the road to prevent an increase of damages due to his default, and gave him due and final notice that the contract and specifications between plaintiff and defendant were rescinded and that plaintiff's connection with the railroad was terminated; that they would take the work in charge and complete the same according to the specifications, holding plaintiff and his bondsmen liable for any losses.

"That defendant company thereupon proceeded to complete the contract and did complete it. That they necessarily expended for labor in so doing the sum of $3,013.08; and were obliged to and did use a locomotive in hauling gravel in connection with said work at a cost of $200 additional.

"That the plaintiff performed extra work and labor for the defendant *Eagle Lime Products Company* in putting in an extra culvert and doing some extra filling, all of the value of $25.

"That the plaintiff performed extra labor for the defendant *Eagle Lime Products Company* upon the land owned by the defendants, *Eagle Lime Products Company* and *William H. Lindwurm,* in filling in around the plant, to the amount of $405.30.

"That the plaintiff has received from the defendant *Eagle Lime Products Company,* in cash, moneys advanced to help on plaintiff's orders and for his account, and for freight and other items, $6,643.36.

"From the foregoing I find that the account between the plaintiff and the defendants should be stated as follows:

*Joseph Whalen*
In account with
*Eagle Lime Products Company.*

| | | | |
|---|---|---|---|
| | Cr. | | |
| Contract price | " | $10,650 00 | |
| Extra filling at plant | " | 405 30 | |
| Extra cattle pass and filling | " | 25 00 | |
| Damages for loss of time of men | " | 200 00 | |
| | | | $11,280 30 |

| | Dr. | | |
|---|---|---|---|
| To amount admitted to have been received, including cash and amounts paid upon orders and agreed journal items | " | $6,618 90 | |
| To journal items allowed, not included in the above | " | 24 46 | |
| To use of engine and crew, ten days at $20 per day | " | 200 00 | |
| To cost of completion of road | " | 3,013 08 | |
| | | | 9,856 44 |
| Balance due plaintiff | | | $1,423 86 |

"That plaintiff duly filed his claims for lien as set forth in his complaints, and that such liens are now valid and existing liens upon the properties described in the complaint.

*"Conclusions of Law.*

"That the plaintiff, *Joseph Whalen,* have judgment against the defendant *Eagle Lime Products Company* upon the cause of action set out in his complaints herein for the sum of $1,423.86, with interest from February 1, 1909; and that the plaintiff have a valid lien against the defendant *Eagle Lime Products Company,* upon the land described in the complaint in his action against the *Eagle Lime Products Company,* in the amount of $1,018.56, with interest from February 1, 1909; that the plaintiff have a valid lien against the *Eagle Lime Products Company* and *William H. Lindwurm* upon the land described in the complaint in his action against the *Eagle Lime Products Company* and *William H. Lindwurm* in the amount of $405, with interest from February 1, 1909."

Motions by the defendants to consolidate the two actions and to modify the referee's report were denied, and the report was confirmed by the court and separate judgments entered, in the first action against the corporation for $1,018.56, with interest thereon since February 1, 1909, and costs, and declaring and foreclosing a lien therefor upon the railroad right of way, and in the second action, against both the corporation and *Lindwurm,* for $405.30, with interest from February 1, 1909, and costs, and declaring and foreclosing a lien therefor upon the manufacturing plant aforesaid. Appeals are now prosecuted from both judgments.

For the appellants there were briefs by *Nath. Pereles & Sons,* and oral argument by *Daniel W. Sullivan* and *A. L. Strouse.*

For the respondent the cause was submitted on the brief of *Merton, Newbury & Jacobson.*

Winslow, C. J. We meet the same difficulty in these actions as in the action of *Cointe v. Congregation of St. John,* 154 Wis. 405, 143 N. W. 180. The statute requiring findings of the ultimate facts has not been complied with. The plaintiff brought the main action to foreclose a lien upon the railroad, alleging that he had fully performed his contract. At the close of the evidence he was allowed to amend his complaint so as to allege that he was prevented from full performance by the refusal of the defendant corporation to pay the plaintiff on monthly estimates as the contract required, and by failure to furnish materials, and by reason of the direction of the company that he cease work.

The referee's report finds that the plaintiff did not complete his contract, but this finding only made the question whether the plaintiff had been prevented from completing the same by any act of the corporation more vital. The ultimate facts in this regard were whether such completion had been prevented by (1) the failure to make payments as the contract required, (2) the failure to furnish materials as the contract required, or (3) an unjustifiable direction to cease work. Upon neither of these ultimate facts was there any finding, either by the referee or the court. This situation makes it necessary for this court to examine the evidence to ascertain whether the judgment is clearly supported by a preponderance of the evidence, and, if not so supported, to ascertain whether the preponderance is so clearly the other way that judgment for the appellant should be ordered, or whether there should be a new trial in order to accomplish the ends of

justice. *Closuit v. John Arpin L. Co.* 130 Wis. 258, 110 N. W. 222.

It is very certain that the contract sued on in the first action was an entire contract and that it was never substantially performed. We shall spend no time on this question. When work to the amount of more than $3,000 remains to be done on a $10,000 contract, it would be absurd to say that the contract was substantially performed.

Turning to the question whether the evidence shows that the plaintiff was prevented from carrying out his contract, either by failure to make the stipulated payments or by failure to furnish the required materials, we are compelled to say, after careful study of the case, that neither fact is proven. The provision for monthly estimates was not regarded as essential or important by either party for the first two months. The company made large payments, which on December 19th amounted to $5,393.40. Both parties then seem to have agreed that an estimate of the work remaining to be done should be made by Mr. Blount, an engineer employed by the Chicago & Northwestern Railway, and who was the engineer in charge of the work. Mr. Blount made an estimate showing that the work still to be done amounted to $3,700. This was the only estimate made, and the plaintiff does not seem to have ever demanded another. On the basis of this estimate there had already been done work to the amount of $6,950, of which eighty-five per cent. would amount to $5,907.50. At that time the defendant company had paid $5,393.40, leaving on this basis $514.10 as the amount then owing on the eighty-five per cent. basis. One week later the defendant company made a written proposition to the plaintiff, offering to pay him this amount, and also offering to waive the eighty-five per cent. clause and pay plaintiff the entire balance for work done at that time, as shown by the estimate of Blount, amounting to $1,042.50, but insisting that the

work must be completed and requiring consent of plaintiff's bondsmen that this variation be made in the contract before making the payment.

We are entirely satisfied from careful perusal of the evidence that the plaintiff's claim that he was prevented from fulfilling his contract, either by failure to make the monthly payments or by failure to furnish materials, is without any substantial foundation in the evidence. There was some delay in furnishing some of the materials which doubtless delayed the work for a time, but the claim that it prevented ultimate performance is entirely unsustained. The plaintiff's own evidence is contradictory and confusing to a degree. At one time he says that if he had got his pay December 19th he would have finished the work; at another time that if he had been furnished the material he would have finished it; at another time that he did not complete it on account of lack of ties, spikes, and force of weather. It is admitted that about January 26th, and after the defendant had again demanded that plaintiff proceed with the work, a gang of men in plaintiff's employ were set to work spiking rails to ties; that the men quit work because Mr. Campbell (defendant's manager) came along where they were at work and told the men that he would not be responsible for their pay. It is clear that at this time the plaintiff had not concluded to abandon the work, and it is equally clear that the materials necessary had been on hand for a considerable time, and that the only real obstacle in the way of the plaintiff was the fact that men would not work for him because they were afraid they could not get their pay unless the defendant company guaranteed it. The defendant company had never contracted to do this and was not obliged to do it.

Not only does the evidence fail to prove that the plaintiff's breach of contract was the result of defendant's default, but it proves quite satisfactorily the reverse. We conclude that there can be no recovery upon the contract. The item of $25

for extra work done at a cattle pass does not seem to be disputed, but it is quite plain that it would not be just to order a recovery for this item. In view of the circumstances the court must apply $25 from the payments already made to the discharge of this item.

We are urged by the appellant company to direct entry of judgment in its favor against the plaintiff for more than $4,000, being the sum which it claims it was obliged to pay out to complete the work over and above the contract price of $10,650. We have examined the evidence and concluded that the claim is untenable. The estimate of the engineer in charge, made in December, was that the work could be completed according to the contract for $3,700. The referee found that the necessary cost of completion was $3,013.08. We are clearly of opinion that the present claim of appellant contains large sums not properly within the field of necessary cost. Without enlarging on this question, we simply express our conclusion that upon no fair estimate could the cost of completion properly exceed the unpaid balance of the contract price.

As to the second action, which involves a claim for grading and filling about the company's plant, we shall state simply conclusions.

While the complaint charged that the company and the defendant *Lindwurm* together promised to pay for this work, and the court entered personal judgment for the amount of the work against both, we find no evidence that *Lindwurm* ever made such a promise or became personally responsible for the payment; hence the personal judgment against him cannot stand.

In other respects the judgment seems to be right. It was admitted on the trial that such filling was done to the amount of $405.30, and it seems to have been work entirely independent of the building of the railroad. No reason is perceived why the plaintiff should not have a lien for that amount.

A motion was made by the defendant company after the trial by the referee to consolidate the two actions, and the denial of this motion is alleged as error.

The question of the consolidation of actions is always one of discretion with the trial court. *Eau Claire F. & S. Co. v. Laycock,* 92 Wis. 81, 65 N. W. 732. It is very much to be desired that where consolidation is possible it should be ordered by the trial courts in the interest of expediting litigation and decreasing the expense thereof. Inasmuch, however, as the conclusions which we have reached dispose of the main action favorably to the appellant and relieve it of any possible duplication of costs, the question becomes to all intents and purposes academic, and we do not feel obliged to pass upon it in this case.

So far as the action to foreclose the lien upon the railroad right of way is concerned, the judgment therein must be reversed with costs, and the action remanded with directions to dismiss the complaint. So far as the action to foreclose the lien upon the plant is concerned, that part of the judgment adjudging a personal recovery against *William H. Lindwurm* must be reversed without costs, and the remainder of the judgment must be affirmed with costs.

*By the Court.*—It is so ordered.

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TALLMAN, Appellant, vs. CHIPPEWA SUGAR COMPANY, Respondent.

*October 7—November 18, 1913.*

***Master and servant: Injury to employee: Safety of working place: Beet pulp on floor of sugar factory: Nonsuit.***

1. In an action for personal injuries sustained by an employee in a beet sugar factory who slipped upon wet beet pulp on the

**floor of a well-lighted room through which the pulp was carried by a conveyor, it is *held* that a nonsuit was properly granted on the ground that the evidence failed to show that the place was not, within the requirement of the Workmen's Compensation Act (sec. 2394—48, Stats., as limited by the definition of the term "safe" in sub. 11, sec. 2394—41), as free from danger as the nature of the employment would reasonably permit.**

**[2. To what extent, if any, the statute modifies the common-law duty of the master to exercise ordinary care in furnishing a safe working place, not determined.]**

APPEAL from a judgment of the circuit court for Chippewa county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

Plaintiff brought this action to recover damages for personal injuries. The defendant owned and operated a beet sugar factory at the city of Chippewa Falls and employed a large number of workmen, including the plaintiff, who performed such work as he was directed. On the 24th day of October, 1911, while in the course of such employment, and about a week after he was hired, the plaintiff, as was his custom, in going to his place of work started to pass through a room in defendant's factory called the pulp room, and as he walked over the floor thereof he slipped on some wet pulp lying on the floor, fell, broke his left leg, and sustained other incidental injuries. The negligence charged was

"that the floor in said room was covered with pulp and refuse of the sugar beets, and that by reason thereof had become wet and slippery, and any person going across said floor would be likely to slip and fall thereon, which said facts were at all times well known to the said defendant and were unknown to this plaintiff; and that the negligence of said defendant consisted in allowing and permitting the said pulp and refuse of sugar beets to remain upon the floor of said room so that the same would be slippery and unsafe for use, and in failing to clean up the said room and remove the sugar beets therefrom so that the same could be used by its employees without danger to them."

The answer denied generally all the allegations of the complaint. At the close of the plaintiff's evidence defendant moved for a nonsuit, which was granted by the court, and from such judgment of nonsuit the plaintiff appealed.

For the appellant there were briefs by *W. H. Frawley & T. F. Frawley,* and oral argument by *Mr. T. F. Frawley.*

For the respondent there was a brief by *W. H. Stafford,* attorney, and *T. J. Connor,* of counsel, and oral argument by *Mr. Stafford.*

VINJE, J. The evidence shows that plaintiff in going to his work on defendant's premises went through an empty room, called the pulp room; that from one side of this room there extended diagonally across a portion of it, and through the ceiling, what is called a pulp screw. This screw carried wet beet pulp from below to a room above. Near the ceiling there was a leak in the screw and water and wet pulp dripped down, so that the floor beneath was covered to the depth of from a quarter of an inch to nearly an inch in thickness over a width of three or four feet and extending clear across the room. Some pulp was also shown to come down from the floor above around where the pulp screw passed through the ceiling. The pulp room was well lighted so that the condition of the floor was readily visible to any one passing over the same. Plaintiff, while going to his work and while walking over the wet pulp, slipped and sustained the injuries complained of.

The claim is that the master failed to furnish plaintiff a safe place in which to work. The injury occurred October 24, 1911, after the Workmen's Compensation Act took effect. The duty of the master, therefore, to furnish a safe place of employment is governed by the provisions of sec. 2394—48, which require that "Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for

employees therein," as limited by the definition of the term "safe" found in sub. 11, sec. 2394—41. Such definition is as follows: "The term 'safe' and 'safety' as applied to an employment or a place of employment shall mean such freedom from danger to the life, health or safety of employees or frequenters as the nature of the employment will reasonably permit." Translating the statutory duty in terms of the definition, we find that it is the duty of the employer to furnish the servant with a place of employment as free from danger to the life, health, or safety of employees or frequenters as the nature of the employment will reasonably permit. In other words, the place of employment must be as free from danger as the nature of the employment will reasonably permit. This is a statutory rule which should receive a liberal construction in favor of life, health, and limb. It does not call for absolute safety in the ordinary sense of the term, but it does require every employer to furnish a place of employment as free from danger as the nature of the employment will reasonably permit. The extent, if any, to which the statute modifies the common-law duty of the master to exercise ordinary care in furnishing a safe place it is thought best now not to inquire into or to determine. The safe course is to tie to the statutory expression of the duty and apply it to cases as they arise. Such expression is so clear and simple that nothing can be made clearer by way of explanation or substitution of phraseology. Like the words "reasonable doubt" in the criminal law, the statutory declaration cannot well be further simplified. But while the test applied is plain, cases will no doubt arise in which there will be a difference of opinion as to whether the employer has complied with the test. Such was the case of *Sparrow v. Menasha P. Co.* 154 Wis. 459, 143 N. W. 317.

In the instant case the employer was operating a beet sugar factory in which beets were reduced to pulp and the pulp carried from room to room in conveyors and finally loaded on to

cars. Any one at all familiar with the operation of manufacturing sugar from beets as customarily carried on in large factories knows that the presence here and there of wet beet pulp is, if not a necessary, at least a usual, incident of such business. It would be practically impossible to operate such a factory without the presence, in places over which employees must walk, of more or less wet pulp. The making, handling, and presence of pulp is a feature of the work itself. The nature of the employment is such that it will not reasonably permit of an entire absence of pulp in places where employees may be required to work or pass over. Just as oil cannot be kept entirely away from the floor under and near an ordinary stationary engine, sawdust from certain parts of a sawmill, or dust from a flour mill or wheat elevator, so wet beet pulp cannot be kept entirely away from many places in a beet sugar factory where employees must work or pass over. Applying the statutory test to the situation as shown by plaintiff's evidence, we reach the conclusion that the trial court properly granted a nonsuit on the ground that the evidence failed to show that the place in question was not as free from danger as the nature of the employment would reasonably permit.

*By the Court.*—Judgment affirmed.

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KRANZ, Administratrix, Respondent, vs. WISCONSIN TRUST COMPANY, Administrator, Appellant.

*October 28—November 18, 1913*

***Actions: Abatement and survival: Wrongful death: Statutes construed.***

**1. The statutory cause of action given by secs. 4255, 4256, Stats., for the death of a person by the wrongful act, neglect, or default of another does not survive the death of the wrongdoer.**

2. Such cause of action is not, within the meaning of sec. 4253, Stats., given for any "damage done to the property rights or interests" of the beneficiaries named in said sec. 4256, but as a new and independent cause of action unknown to the common law, and hence is not included in survival statutes using terms applicable only to common-law actions.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

On March 19, 1910, Paul Kranz, while an employee in a cooper shop owned and operated by Fred Ketter, was injured, and later died as a result of such injury. February 20, 1912, this action was brought by plaintiff, as the administratrix of the estate of Paul Kranz, deceased, under secs. 4255 and 4256, Stats. 1911, for the benefit of herself as widow. The defendant answered, and afterwards, on March 22, 1912, he died. On December 7, 1912, an application was made by plaintiff to revive the action against the defendant as administrator of the estate of Fred Ketter, deceased. From an order granting such application the defendant appealed.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent the cause was submitted on the brief of *Curtis & Mock.*

VINJE, J. Defendant assigns as error that the order is improvidently made and that the circuit court had no jurisdiction to make the same. So far as we have been able to discover, there seem to be no indicia of improvidence or abuse of discretion in granting the order if the cause of action survived the death of the wrongdoer. Due and proper proceedings were had pursuant to sec. 2803, Stats. 1911, which provides that "In case of the death or other disability of a party, if the cause of action survives or continues, the court, on motion, at any time within one year thereafter or afterwards, on a supplemental complaint, may allow or com-

pel the action to be continued by or against his representatives or successor in interest." The inquiry, therefore, must be limited to the question whether or not a cause of action given by secs. 4255 and 4256, Stats. 1911, for death by wrongful act in favor of beneficiaries standing in a certain relation to the deceased, survives under the provisions of sec. 4253, Stats. 1911, which reads:

"In addition to the actions which survive at common law the following shall also survive: Actions for the recovery of personal property or the unlawful withholding or conversion thereof, for assault and battery, false imprisonment or other damage to the person, for all damage done to the property rights or interests of another, for goods taken and carried away, for damages done to real or personal estate, equitable actions to set aside conveyances of real estate, to compel a reconveyance thereof, or to quiet the title thereto, and for a specific performance of contracts relating to real estate."

Unless some statute can be found providing for survival, the action abates. Such was the rule of the common law. *Milwaukee Mut. F. Ins. Co. v. Sentinel Co.* 81 Wis. 207, 211, 51 N. W. 440; *Bates v. Sylvester,* 205 Mo. 493, 104 S. W. 73. Non-assignability and non-survival were held interchangeable terms. *Hegerich v. Keddie,* 99 N. Y. 258, 1 N. E. 787; *Brackett v. Griswold,* 103 N. Y. 425, 428, 9 N. E. 438; Tiffany, Death by Wrongful Act (2d ed.) § 119.

It is claimed by plaintiff that the clause "for all damage done to the property rights or interests of another" provides for the survival of the action against the estate of the tortfeasor. Such clause was added to sec. 4253 by ch. 353, Laws of 1907, to make the survival statute, as was stated in *Harris v. Welch,* 148 Wis. 441, 446, 134 N. W. 1041, harmonize with the survival statute of New York. But the New York court, as early as 1885, in *Hegerich v. Keddie,* 99 N. Y. 258, 1 N. E. 787, decided that the clause "for all damage done to the property rights or interests of another" meant for all damage done to the property rights or interests of the de-

ceased, and not to the property rights or interests of a relative or beneficiary named under the statute giving such relative or beneficiary a right of action by reason of the death of the deceased by wrongful act, and it was there held that the statutory cause of action for the death of a person by the wrongful act or negligence of another abated upon the death of the wrongdoer. The same result has been reached by other courts under similar statutes. See *Moe v. Smiley,* 125 Pa. St. 136, 17 Atl. 228; *Russell v. Sunbury,* 37 Ohio St. 372; *Hamilton v. Jones,* 125 Ind. 176, 25 N. E. 192; *Green v. Thompson,* 26 Minn. 500, 5 N. W. 376; *Johnson v. Farmer,* 89 Tex. 610, 35 S. W. 1062; *Bates v. Sylvester,* 205 Mo. 493, 104 S. W. 73; *Beavers's Adm'x v. Putnam's Curator,* 110 Va. 713, 67 S. E. 353; *Davis v. Nichols,* 54 Ark. 358. Tiffany, in his work Death by Wrongful Act (2d ed.) § 119, also states such to be the rule in the absence of express statutory provisions found only in a few states. Whether such omission in our statute is the result of inadvertence or design, it is immaterial to inquire, as was said in *Johnson v. Farmer, supra.* The action itself is a statutory creature, and statutory authority for its survival upon the death of the wrongdoer must be found, or else it abates. And in this connection it should be observed that there is a vital difference between the survival of a cause of action upon the death of the injured party and a survival of liability upon the death of the wrongdoer. A statute may provide for the one and not for the other. *Meekin v. B. H. R. Co.* 164 N. Y. 145, 152, 58 N. E. 50.

The ground upon which it has been held that an action for wrongful death does not survive the death of the wrongdoer is that it does not accrue until the death of the injured party, and it is then not a devolution of any pre-existing cause of action, but is purely a statutory creation given not for any damage to the person or to the property rights or interests of the beneficiaries, but as a new and independent cause of ac-

tion unknown to the common law. Hence survival statutes using terms applicable only to common-law actions do not include the action for death by wrongful act.

In *Devine v. Healy,* 241 Ill. 34, 89 N. E. 251, it was held that under a statute providing for the survival of an action for "injuries to the person" an action under the death statute survived. It would seem that such a ruling fails to distinguish between the derivative common-law action for injury to the person and the statutory action under consideration.

In view of the origin of our statute and the construction given similar statutes by New York and other courts, we deem it better to follow such constructions than to examine the question from an original point of view. This is in conformity with the ruling in *Sutherland v. Drolet,* 154 Wis. 619, 143 N. W. 663. If a different rule should be desired, the legislature can easily provide for it.

*By the Court.*—Order reversed, and cause remanded with directions to dismiss the complaint.

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SCHMIDT, Respondent, vs. CITY OF MILWAUKEE, imp., Appellant.

*October 28—November 18, 1913*

***Taxation: Action to set aside assessment: Defenses: Payment to certificate holder.***

**In an equitable action to set aside illegal special assessment certificates and obtain a reassessment, where plaintiff has paid the amount of the assessment to the city treasurer pursuant to sec. 1210*h*—1, Stats., the fact that said treasurer has paid the same over to the certificate holder as required by ch. 203, Laws of 1905, is not a defense. *Marine Co. v. Milwaukee,* 151 Wis. 239, distinguished.**

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.*

For the respondent there was a brief by *Aarons & Niven,* and oral argument by *C. L. Aarons.*

WINSLOW, C. J. This is an action to set aside a special assessment for street paving on the ground of illegality. The plaintiff paid the amount of the assessment to the city treasurer (pursuant to the requirements of sec. 1210*h*—1, Stats.), and the city treasurer turned over the sum so paid to the holder of the special assessment certificate (as required by ch. 203, Laws of 1905). The city by answer set forth this payment to the certificate holder as a separate defense and a general demurrer thereto was sustained.

This ruling must be affirmed. This is not an action for money had and received, nor is it an action brought under sec. 1164, Stats., hence the case of *Marine Co. v. Milwaukee,* 151 Wis. 239, 138 N. W. 640, has no application. It is an action in equity to set aside illegal special assessment certificates and obtain a reassessment. In such an action the statute specifically provides that if the claim is made that the tax is invalid because of defects going to the validity of the assessment and affecting the groundwork of the tax, the plaintiff shall pay the amount levied as a condition of maintaining the action, and in case a reassessment is ordered and the court determines that the amount which the plaintiff ought justly to have paid is less than the original assessment the plaintiff shall recover judgment for the difference. Secs. 1210*h*—1 to 1210*h*—4, Stats. 1911. He is entitled to this judgment regardless of the fact that the treasurer has paid over to the certificate holder the amount previously paid in, hence that fact is entirely irrelevant. Under these statutes the city is responsible for the illegal portion of the original assessment, not on the ground that it has received money which it ought not in good conscience to keep, but because it

has compelled the plaintiff to pay more than he could justly be compelled to pay, and must respond in damages for its wrongful act.

*By the Court.*—Order affirmed.

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## WILL OF EHLERS: APPEAL OF HASS.

*October 28—November 18, 1913.*

***Wills: Construction: Intention of testator: Uncertainty.***

1. **The paramount rule in construing a will is that the intention of the testator should prevail so far as it can be read out of the language used to express it.**
2. **Of two reasonable meanings, one which will render a will void in whole or in part for uncertainty and one which will not, the latter is to prevail.**
3. **Ordinarily, the last clause of two which conflict is supreme; but this has no application where the effect would be to defeat the real intent.**
4. **A will giving to testatrix's four stepchildren (named in the will and called "my children") "each an undivided one-fifth part of my estate," and to her five grandchildren, "each an undivided one-tenth part of my estate," the fractions named totaling thirteen tenths, is construed as giving one fifth of the estate to each of the stepchildren and one twenty-fifth to each of the grandchildren.**

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action for construction of a will. The proceeding was commenced in county court. It involved the meaning of this provision of the instrument:

"I give, devise and bequeath to my children, *Mary Neumeyer* (née *Ehlers*), *Minnie Radenz* (née *Ehlers*), *Ida Hass* (née *Ehlers*) and *Alwine Ehlers* to each an undivided one-fifth part of my estate and to the children of my son, *Carl Hass,* whose names are *Margaretha Hass, Adela Hass, Marie*

*Hass, Paul Hass* and *Carl Hass,* each an undivided one-tenth part of my estate."

The petition for construction was made by *Carl Hase,* only child of the testator's blood. The persons remembered as her children were her stepchildren. There was no residuary clause as such and no devise or bequest except those mentioned in the quoted provision.

The county court decided that the will was void for uncertainty. On appeal to the circuit court that was reversed and the will sustained as bequeathing one fifth of the estate to each of the four stepchildren and one twenty-fifth to each of the grandchildren.

*Rossiter Lines,* for the appellant, contended that the will fails to disclose the intention of the testatrix and that any effort to give effect to its provisions must rest upon conjecture alone. The intention which is sought for in the construction of a will is not that which existed in the mind of the testator but that which is expressed by the language of the will. *Willey v. Clark,* 105 Wis. 22, 24, 25, 80 N. W. 102; *Pabst v. Goodrich,* 133 Wis. 43, 66, 113 N. W. 398; *In re Donges's Estate,* 103 Wis. 497, 500, 501, 79 N. W. 786; *Will of Ohse,* 137 Wis. 474, 119 N. W. 93; *Burke v. Lee,* 76 Va. 386; *Gee v. Gee,* 204 Ill. 588, 68 N. E. 515; *Daugherty v. Rogers,* 119 Ind. 254, 20 N. E. 779; *Waters v. Bishop,* 122 Ind. 516, 24 N. E. 161; *Stokes v. Van Wyck,* 83 Va. 724, 3 S. E. 387; *Byrn v. Godfrey,* 4 Ves. Jr. 5; *In re Creighton's Estate,* 91 Neb. 654, 136 N. W. 1001; *Rodisch v. Moore,* 257 Ill. 615, 101 N. E. 206; *Graves v. Rose,* 246 Ill. 76, 92 N. E. 601.

*Frank B. Van Valkenburgh,* guardian *ad litem,* for the respondents *Paul Hase* and *Carl Hase.*

For the respondent executrix the cause was submitted on the brief of *Froede & Bodenstab.*

MARSHALL, J. Much difficulty is liable to occur in initial trials, involving the construction of wills by taking some par-

ticular adjudications respecting some other wills as controlling, instead of looking to legal principles for guidance, or from following some well known rule for judicial construction as if it were applicable, universally, instead of appreciating that, in general, such rules are to be used in choosing between reasonable meanings of substantial equal dignity and keeping prominently in mind that paramount to all others, is the rule that the intention of the testator should prevail so far as it can be read out of the language used to express it. Then one is liable to go widely astray if it be not appreciated that while, primarily, it is to be presumed that a testator used language in its common ordinary and literal sense, that yields easily to the fact, in case of the fact existing from any legitimate cause, that read in such sense the meaning would be left in obscurity or found to be contrary to the testator's intention.

The court has very great power which may be exercised to prevent failure of a testator's purpose, all in harmony with the rule that the legal intention of the testator is the one expressed by his language, though it may not be exactly the real intention he had in mind,—that his purpose can be given vitality only so far as it can be read reasonably out of the will,—but to the end that the testamentary idea may be so read the language should be examined in the light of the situation of the testator at the time he used it and all environing circumstances. If thereby the intention is plain, or the major probabilities are on the side of a particular intent, for the purpose of so reading the will as to express it, words may be given a very broad or very restrictive meaning, going to the very limit of the boundaries of reason, or may be transposed or rejected, or words not seen, may be read in place which are there by reasonable or necessary inference, or may be transposed or supplied, and thus the language be moulded to express, so far as can reasonably be done, the testator's intention. True, the heir at law is to be favored, but that is a

rule to aid in making a choice between reasonable meanings. True, too, ordinarily, the last clause of two which conflict, is supreme, but it has no application where the effect would be to defeat the real intent. These principles are so familiar and have been so often applied in this court that a mere statement of them is sufficient for the purpose of this case.

In the light of the foregoing the way to a solution of the question presented for decision is fairly plain. The will, as a whole, shows without room for reasonable controversy, these circumstances: The testatrix intended that none of her property should go to her only heir at law. She purposed providing for a distribution of all her estate. She had in mind two classes of beneficiaries, the first, consisting of four members and denominated her "children," though they were only her stepchildren, and the second, consisting of five members,—her grandchildren. She gave the stepchildren the place of first importance showing that she regarded them the nearest to her as worthy of being bountifully remembered.

Now one of the most weighty rules for judicial construction is that of two reasonable meanings, one which will render a will void, in whole or in part, for uncertainty and one which will not, the latter is to prevail. In view of that and the manifest purpose of the testatrix to dispose of all of her property, the circumstance that she regarded the members of the first class of beneficiaries as if they were her children in the first degree of her own blood,—the major probabilities seem to be that she purposed providing for them as a preferred class and dividing the residue of her estate between her grandchildren, as the circuit court held. To say that there is as much reason for holding that the testator erred in naming the fraction of her estate she intended for her so-called children as in naming the fraction for the grandchildren, would ignore the fact that the former were first in her affection, and that she, quite plainly, intended to first provide for them and bestow the residue of her estate on the members

of the class who were second in importance. After having given one fifth of her estate to each of the four members of the first class, there was left but one fifth to be divided between the five members of the second class, or one twenty-fifth to each, instead of one tenth. That she intended the residue to go to them in equal shares and used the word "one tenth" by mistake, seems quite plain. The improper designation of the fraction may be rejected, as we have seen, and the will read as bequeathing the residue of the estate, left after setting aside four fifths for the first class, to the members of the second class in equal shares.

Probably as good an illustrative case of the power of judicial construction in such circumstances as we have here is *Ellis v. Fairbanks,* 132 Mass. 485, where the fractional parts of an estate devised or bequeathed exceeded the whole. The last was treated as referring to the residuum, the designation of the fractional part being wholly rejected as that would cure the difficulty and effect the testamentary purpose. Quite as much liberty was taken with the testator's language in *Waters v. Hatch,* 181 Mo. 262, 79 S. W. 916, where he willed sixty shares of stock in a particular bank to one person and twenty shares of stock in the same bank, to another, though he owned but sixty shares of such stock. However, he owned twenty shares of stock in another bank and the name thereof was substituted so as to carry out the manifest intent, the court remarking:

"By following the letter of the will and shutting the eyes to the intention of the testator, this provision of the will would be nullified. But if the intention is observed the clause is full of meaning. It is the duty of the court to give such construction to a will as will effectuate the manifest intention of the testator as discerned from the whole will itself, and not so construe it as to cause any of the provisions to perish."

So here, if the manifest intent of the testatrix to make a complete disposition of her estate and to treat the members of the first class of her beneficiaries as her children and as hav-

ing paramount claims upon her bounty, the last clause of the language in question is full of meaning and tells a pretty plain story, viz.: that the grandchildren should take in equal shares the residue of the estate left after providing for the members of the first remembered as indicated.

In *Estate of Wood,* 36 Cal. 75, the word "testate" was substituted for the word "intestate." Otherwise the instrument purporting to be a will would have no effect whatever.

In *Metcalf v. Framingham Parish,* 128 Mass. 370, a defect of a material character was remedied by supplying language in place by implication so as to effect the intent of the testator. Many instances are therein referred to of like dealing with such matters.

In *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786, in order to give the will the effect the testator intended, the real purpose was read out of it by interpolating a clause containing six words, and it was pointed out that the dominant rule of construction is that the intention of the testator, so far as reasonably readable out of his will, must govern and that all other rules are merely helpful indications to be given more or less weight according to circumstances, or none at all in case of countervailing considerations.

*By the Court.*—The judgment is affirmed.

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MANTHEY, Respondent, vs. MANGER and wife, Appellants.

*October 28—November 18, 1913.*

*Building contracts: Substantial performance: Reasonable value of work done.*

In an action for the reasonable value of materials furnished and work done in decorating a dwelling house, findings of a referee, confirmed by the trial court, to the effect that, although the work was not first class, yet it was a fairly good job; that the defects therein were due in part at least to conditions over

**which plaintiff had no control; and that it was reasonably worth a certain sum, are *held* to be supported by the evidence and to sustain a judgment in plaintiff's favor for the value so found. *Manthey v. Stock*, 133 Wis. 107, distinguished.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This action was brought to recover for services performed and material furnished in decorating the premises belonging to the defendants. The plaintiff alleged a special contract to do the job for $310, and also alleged that he performed extra work and furnished material not included in the first contract which are reasonably worth $345, amounting in all to $655, for which he demanded judgment and a lien.

The answer denied the contract set up in the complaint and set up a different contract. The case was referred and the plaintiff permitted to amend his complaint by striking out the allegation that the work was to be done for $310 and substituting in lieu thereof that the work was performed and materials furnished at the special instance and request of the defendants and that the defendants agreed to pay the plaintiff what the same were reasonably worth.

The referee found all the facts in favor of the plaintiff, and found among other things that, had the work been done in a first-class manner, the reasonable value would have been $550, but that as actually performed, if the nails in the cove had been properly protected, is of the value of $450, to which the plaintiff is entitled in addition to the extra work as hereinafter mentioned; that after the work was completed changes were made and extra work performed at the request of the defendants which was reasonably worth $75; that the reasonable cost of boring out nail holes in the cove in reception room, parlor, and upper stairway, and puttying up the same and properly redecorating the cove (hereinbefore referred to), is of the reasonable value of $25, and that the de-

fendants are entitled to have an allowance for this work in such sum; that there became due and owing to the plaintiff for the work and labor so performed $525, less a setoff of $25 due to defendants as above found, leaving a net sum of $500, with interest from the 5th day of October, 1910, no part of which has been paid, and that there still remains unpaid $500, with interest as aforesaid. Further findings are made respecting plaintiff's right to lien and the following

*Conclusions of Law.*

"1. That the plaintiff is entitled to have his complaint amended by striking out the allegation therein that part of the work and labor performed and materials furnished were performed and furnished under a contract to do the same for the sum of three hundred and ten ($310) dollars, and by alleging that such work performed and materials furnished were performed and furnished at the special instance and request of the defendants, and that the defendants agreed to pay the plaintiff therefor what the same was reasonably worth.

"2. I find that the plaintiff is entitled to judgment for the sum of five hundred and twenty-five ($525) dollars, less a setoff of twenty-five ($25) dollars in favor of the defendants, or for the net sum of five hundred ($500) dollars, with interest thereon from the 5th day of October, 1910, for such work and labor performed and materials furnished.

"3. That the plaintiff is entitled to have the same adjudged a lien upon said premises described in the complaint, and that the interest of the defendants, *Arthur Manger* and *Clara Manger,* owning such premises at the time of the commencement of the work and the furnishing of the materials for which the lien is claimed, or which they, or any person claiming under them, have since acquired, be sold to satisfy the amount of the lien so ascertained and adjudged.

"4. And let the usual judgment be entered therefor, with costs and disbursements, as demanded in the complaint."

Due exceptions were filed to the report of the referee and motion made by defendants to alter and amend said report; also a motion was made by plaintiff to confirm; and the court

confirmed the report of the referee and judgment was entered accordingly in favor of the plaintiff, from which this appeal was taken.

*John J. Maher,* for the appellants.

*Charles F. Puls, Jr.,* for the respondent.

KERWIN, J. The referee made very full and exhaustive findings and found all the facts in favor of the plaintiff. The court below confirmed the report of the referee, and if the findings are supported by the evidence the judgment below must be affirmed.

After the complaint had been amended the action stood to recover for materials furnished and services performed what the same were reasonably worth and to foreclose a lien on the premises. The referee found the work and labor done and materials furnished reasonably worth $450, less a setoff of $25, and also found other work for changes in addition to the $450 job in the sum of $75, making in all $500 as the reasonable value of the work done and materials furnished.

The contention of the appellants is that they were entitled to first-class work and that the job was not first class. The referee found that the job was not first class, but found its reasonable value, and the complaint as amended was for recovery of the reasonable value. The findings and the evidence show that the defects in the work were not wholly the fault of respondent. The referee found that the defects in the work were due partially to the fact that the walls and ceilings are not in a perfect plane, particularly the walls of the hallway upstairs are uneven, and other parts of the walls and ceiling are uneven. The referee found defects were trifling and would pass unnoticed to the casual observer and that no part of the work is worthless. The findings, which go into detail in describing the work and its character, show that the job is a fairly good job and worth the amount awarded to plaintiff. There is evidence that the job could

be put in a first-class condition for about $125. One witness testified that the difference between the value of the entire job if completed in a first-class, workmanlike manner and its value as completed by respondent is $125. Another witness testified that the defects were not due to the work of respondent, but that they were due to the condition of the plaster.

Appellant relies upon *Manthey v. Stock,* 133 Wis. 107, 113 N. W. 433. We think the facts in the instant case distinguish it from the *Manthey Case.* The defects in the work in the instant case were due in part at least to conditions over which respondent had no control. The work is shown by the evidence to be of the value found and can by the expenditure of about $125 be put in good condition. We think the findings are supported by the evidence and support the judgment.

*By the Court.*—The judgment is affirmed.

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ARNOLD, Sheriff Plaintiff in error, vs. SCHMIDT, Defendant in error.

*October 28—November 18, 1913.*

Habeas corpus: *What errors available: Abuse of writ: Imprisonment: When term commences: Physicians and surgeons: Osteopathy: Unlicensed practice: Chiropractice: Statutes: Validity: Constitutional law.*

1. Error in dismissing the appeal of a convicted person is not available on writ of *habeas corpus.*
2. Where, after sentence of imprisonment, a convicted person appealed and no commitment was issued and he was not in fact imprisoned pending such appeal, his term of imprisonment did not begin until he was taken into custody on a commitment thereafter issued.
3. Upon a criminal complaint charging that defendant unlawfully practiced osteopathy and for a fee or compensation prescribed and applied osteopathic manipulation without having obtained a license authorizing him so to do, the court had jurisdiction

to determine whether the so-called chiropractic manipulation which defendant prescribed and practiced was in fact a branch of osteopathy within the meaning of secs. 1435*b*, 1435*e*, Stats.; and the error, if any, in holding that it was such a branch was not a jurisdictional error available on writ of *habeas corpus.*

4. Under secs. 3408, 3410, Stats., where a writ of *habeas corpus* is applied for by a person who has been committed or detained by virtue of a final judgment of conviction, the writ should be refused if it appears that such judgment was rendered by a court of competent jurisdiction; and where this does not appear until the hearing the writ should be quashed and the prisoner remanded.
5. *Habeas corpus* is in its nature a summary proceeding, and it is an abuse of the writ to issue it, remand the accused to the custody of his attorney or permit him to go at large on his own recognizance, and then hold the cause for several months under consideration.
6. One who, never having applied for a license, is convicted of practicing osteopathy without a license, cannot in a proceeding by *habeas corpus* raise the question of the validity of sec. 1435*b*, Stats., so far as it prescribes qualifications for entering upon the study of osteopathy.
7. The legislature has power to require persons practicing osteopathy to obtain a license, and to enforce such requirement by fine and imprisonment for practicing without a license.
8. The fact that such a statute is limited to persons practicing for a fee does not render it invalid, that being a legitimate ground of classification.

ERROR to review an order of the circuit court for Milwaukee county discharging the defendant in error on *habeas corpus:* LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

For the plaintiff in error there was a brief by *A. C. Umbreit,* attorney, *E. J. Yockey,* district attorney for Milwaukee county, and the *Attorney General,* and oral argument by *Mr. Umbreit.*

For the defendant in error there was a brief by *H. L. Eaton,* attorney, and *Jared Thompson, Jr.,* of counsel, and oral argument by *Mr. Eaton.*

There was also a brief by *Morris & Hartwell, amici curiæ.*

TIMLIN, J. On February 14, 1912, complaint was made to the district court of Milwaukee county charging that the defendant in error (hereinafter called defendant) did on February 12, 1912, in the county of Milwaukee unlawfully and without authority hold himself out to the public as a physician, surgeon, and osteopathist, and did then and there unlawfully and without authority in law practice medicine, surgery, and osteopathy, and did then and there for a fee and for a compensation prescribe and recommend for a like use and apply medical and surgical treatment and osteopathic manipulation for the cure and relief of wounds, bodily injuries, infirmities, and diseases, not then and there possessing and not having obtained a license authorizing him so to do, contrary to the statute, etc. On this complaint a warrant was issued, the defendant arrested and brought before said court, and after trial found guilty "as charged in the complaint" and adjudged to pay a fine of $100 and costs and be committed to the house of correction of Milwaukee county at hard labor until said fine and costs were paid or discharged, but such imprisonment not to exceed in all thirty days. Thereafter and on February 28th next defendant filed with the clerk of said court a notice of appeal to the municipal court, attempting thereby to appeal from said judgment and sentence, together with a recognizance on said appeal. While said cause was pending on this appeal in the municipal court and on June 14th next, the district attorney moved to dismiss the appeal, and on June 18, 1912, the appeal was by order dismissed. The appeal was improperly dismissed, but that error is not available in this proceeding. *State ex rel. Kassner v. Momsen,* 153 Wis. 203, 140 N. W. 1117. The municipal court, however, held the case for further argument until October 8, 1912, when he ordered that all papers, files, and records in the cause be remanded to the district court of Milwaukee county. On the date last mentioned the last

named court issued a commitment committing the defendant to the house of correction "until such fine and costs are paid or until he shall be thence discharged by due course of law," but not to exceed thirty days. Under such circumstances the term of imprisonment had not expired and did not begin until defendant was taken on the commitment. *State ex rel. Kassner v. Momsen, supra.* Defendant was taken in custody on this commitment by the plaintiff in error (hereinafter called plaintiff), whereupon defendant at once procured a writ of *habeas corpus* from the circuit court for Milwaukee county, and the latter court on January 22, 1913, in proceedings upon said writ, discharged the defendant from custody on the ground that his imprisonment was illegal. Between the time of the issuing of the writ of *habeas corpus* on October 8, 1912, and the order of discharge on January 22, 1913, the defendant was in the custody of his attorney by order of the court and was not in the custody of the sheriff of Milwaukee county or any other peace officer or keeper of the common jail or in other place of incarceration.

The plaintiff contends that the discharge was illegal and unauthorized because the circuit court considered the evidence taken on the trial, the transcript of which was attached to and made part of the petition for *habeas corpus,* and therefrom concluded that there was no evidence tending to show the defendant guilty of any offense. The defendant maintains the right and duty of the circuit court to so examine the evidence and decide thereon in a *habeas corpus* proceeding. Counsel substantially agree that there was evidence that the defendant for pay treated a person claiming to be suffering from some ailment by rubbing or manipulating the spine of such person. They agree further that the defendant claimed to be acting as a "chiropractic" in so doing. The statute (sec. 1435*b*) provides for licensing all persons practicing medicine, surgery, or osteopathy in any of their branches in this state, and further (sec. 1435*e*) that any person begin-

ning such practice without having obtained such license, etc., shall be punished by fine, etc.

If the complaint had charged that the defendant carried on business as a chiropractic and did for a fee or compensation prescribe or recommend chiropractic manipulation, it is probable the complaint would state no offense; but if to this were joined an averment that that which the defendant practiced and carried on and prescribed was in fact a branch of osteopathy, although defendant called it by the other name, the complaint would be good. So under the complaint in the instant case and the evidence the district court had jurisdiction to decide this very question. He might have been convinced that the defendant was practicing osteopathy notwithstanding defendant chose to call it by another name. The district court had jurisdiction to construe this statute, and if he erred in his construction so as to make the term "osteopathy" cover more than it should cover and include the quite similar acts done by the defendant, that was not jurisdictional error. The remedy for such error in that court is by appeal. There is considerable confusion in the cases relative to what deficiencies in evidence may be reviewed on *habeas corpus.*

It is unprofitable to consider the conflict of authority existing elsewhere. The rule of law for this state is found in *State ex rel. Durner v. Huegin,* 110 Wis. 189, at page 237 (85 N. W. 1046).

In *habeas corpus:* "The reviewing court, in the exercise of its function, must necessarily pass upon and reverse or affirm the decision of the committing magistrate, if such matters are properly presented for its consideration, according to its determination thereof, and in doing so it does not go beyond jurisdictional defects. It can examine the evidence only sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. It cannot go beyond that and weigh the evidence. . . . When it has discovered that there was compe-

tent evidence for the judicial mind of the examining magistrate to act upon in determining the existence of the essential facts, it has reached the limit of its jurisdiction on that point. If the examining magistrate acts without evidence, he exceeds his jurisdiction; but any act, upon evidence worthy of consideration in any aspect, is as well within his jurisdiction when he decides wrong as when he decides right."

The foregoing states the rule with reference to review on *habeas corpus* of the decision of the examining magistrate in proceedings for the arrest and examination of offenders and in analogous cases. The scope of review on the writ could not exceed this in any case. Where as in the instant case there was a trial and final judgment of conviction, this rule is affected by sec. 3408, Stats., which provides that no person shall be entitled to prosecute the writ of *habeas corpus* who shall have been committed or detained by virtue of the final judgment or order of any competent tribunal of civil or criminal jurisdiction or by virtue of any execution issued upon such order or judgment. The application for the writ is by sec. 3410 required to state that the person restrained of his liberty is not committed or detained by virtue of any process, judgment, order, or execution specified in sec. 3408. When it appears that the conviction is by a judgment of a court of competent jurisdiction, the judge or court to whom application is made should refuse the writ in the first instance, and where this does not appear until the hearing he should quash the writ and remand the prisoner. *In re Murphy,* 148 Wis. 292, 134 N. W. 823.

We cannot approve the delay which was permitted in the instant case on the hearing. *Habeas corpus* is in its nature a summary proceeding, and it is an abuse of the writ to issue it, remand the accused to the custody of his attorney or permit him to go at large on his own recognizance, and then hold the cause for several months under consideration. We appreciate the known learning and devotion to duty of the learned circuit judge, and it may be that he was impressed

with the severity of the proceedings against the defendant, the improper dismissal of the appeal, and the zeal with which he was prosecuted and the probable *animus* of the prosecution, and was anxious to find some way to mitigate the rigor of the law, but this must be done at the trial and by proper instructions to the jury and not by an abuse of the writ of *habeas corpus*. Nothing tends more strongly to bring the administration of the law into disrepute or to make a mere "scarecrow of the law" than to see convicted persons enjoying the same privileges as other citizens, parading their immunity before the public, and treating the public laws with open scorn or contemptuous indifference. Cities in this country might be named where the abuses which have grown up in *habeas corpus* proceedings are so flagrant as to threaten the continued existence of the power to issue the writ.

The statute under which the defendant was prosecuted, so far as relevant here, on its face purports to prescribe qualifications for and to authorize the licensing of persons practicing medicine, surgery, or osteopathy, and imposes penalties for unlicensed practice. In this case we need only consider the charge of practicing osteopathy for a fee without having a license or certificate of registration.

Osteopathy is defined in Webster's New International Dictionary as "a system of treatment based on the theory that diseases are chiefly due to deranged mechanism of the bones, nerves, blood vessels, and other tissues, and can be remedied by manipulations of these parts."

Chiropractice appears to be a newly coined compound word suggesting hand practice. To plaintiff's counsel it means an operation or manipulation founded in ignorance, ineffectual in results, and propagated and spread by fraud, while to defendant's counsel it indicates a very simple and beneficial massage of the spine. The state may well require a license for the purpose of regulation and it may prescribe reasonable qualifications of the licensee, having reasonable relation to the

business or profession of osteopathy, understanding the latter as above defined. Some of the qualifications required in the case of osteopaths seem quite extreme, but we must grant something to the judgment of the legislature, and people must learn to hold their legislators responsible for unwise or extreme laws which are nevertheless constitutional. Whether the art of chiropractice is within the statute against practicing osteopathy is, under the foregoing circumstances, a question of fact to be proven by an authentic description of the former, and that question does not arise upon this record.

We do not think the validity of the statute, so far as it prescribes qualifications for entering upon the study of osteopathy, are before us. The defendant, not having applied for a license, cannot raise that question. There cannot be much doubt that the legislature possesses the general power to require persons practicing osteopathy as above defined to obtain a license. Consequently it has the power to enforce this requirement by fine and imprisonment for practicing without a license. It does not invalidate the statute that it is limited to persons practicing for a fee. That is a legitimate ground of classification. *Ex parte Collins,* 57 Tex. Crim. 2, 121 S. W. 501; *Watson v. Maryland,* 218 U. S. 173, 30 Sup. Ct. 644; *Collins v. Texas,* 223 U. S. 288, 32 Sup. Ct. 286.

*By the Court.*—The order discharging the defendant is reversed, and the cause remanded with directions to enter an order remanding the defendant to the custody of the sheriff under the commitment in question.

CARLSON, Respondent, vs. DIXON, Appellant.

*October 29—November 18, 1913.*

***Pledge or sale of corporate bonds? Evidence: Findings of fact: Appeal: Limitation of actions: Payments tolling statute.***

1. In an action to foreclose an alleged pledge of corporate bonds, with which were delivered to the pledgee stock of the corporation to an equal amount, plaintiff testified that the transaction was a loan with collateral security, and defendant testified that it was an absolute sale of the bonds, with the stock given as a bonus. There were no other witnesses on the point. *Held* that, although there were persuasive circumstances corroborating defendant's version, the finding of the trial court in plaintiff's favor was not so clearly against the preponderance of the evidence as to justify a reversal.
2. Where the interest coupons upon bonds pledged as security for a loan were regularly sent to the borrower at his request, and he collected the same and sent his personal checks to the lender for the amounts so collected, the borrower thereby made payments upon his debt which interrupted the running of the statute of limitations.

APPEAL from a judgment of the circuit court for Milwaukee county: E. B. BELDEN, Judge. *Affirmed.*

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

*A. C. Umbreit,* for the respondent.

BARNES, J. The plaintiff claims that in July, 1903, he loaned the defendant $1,000, taking as collateral security bonds of the Milwaukee Granite Company of the par value of $1,000. Stock in the same company to a like amount was delivered with the bonds, and it does not very clearly appear from plaintiff's evidence whether the stock was intended as security or as a gift or a bonus. This action is brought to foreclose the pledge and for a deficiency judgment.

The defendant claims that he was a broker engaged in sell-

ing bonds, among others those of the Granite Company, and that he sold the bonds outright to the plaintiff, giving an equal amount of stock as a bonus with the bonds. Plaintiff and defendant were the only witnesses who testified to the transaction, and the court found the facts in plaintiff's favor. The defendant seeks to reverse the judgment on two grounds: (1) The finding of the court that the transaction was a loan and not a sale is against the clear preponderance of the evidence; and (2) the plaintiff's right of action was barred by the statute of limitations.

1. On the first assignment of error it is urged that the circumstances shown clearly indicated that the defendant gave the correct version of the transaction. These circumstances in the main were: (a) No note or other evidence of indebtedness was given to the plaintiff. (b) No time of payment was fixed. (c) No rate of interest was agreed on. (d) No demand for payment of any part of the principal or interest was made so long as the interest on the bonds was paid, nor for some time after the Granite Company ceased paying interest. (e) No satisfactory explanation was made as to why the corporate stock was given to the plaintiff if the transaction was in fact a loan; and (f) to hold that defendant hypothecated the bonds instead of selling them would mean that defendant must have embezzled them.

These circumstances are quite persuasive, although the effect of the first and most convincing of them is mitigated by the fact that the parties had been friends for fifteen years, and plaintiff was defendant's physician and had loaned him money on former occasions, although when prior loans were made plaintiff had always taken a note. If we were passing original judgment on the evidence as it appeared in print, we might well reach the conclusion that the plaintiff was not entitled to recover, although there are some circumstances which tend to corroborate his evidence. But where fairly consistent and probable narratives are given by witnesses

whose interests in the result do not differ, the printed testimony of one carries about as much weight to the mind as does that of another. This is not necessarily so, however, where the trier of fact has the opportunity to observe the witnesses as they testify. There may be such a contrast between the candor, the demeanor, and the manner of giving testimony by two witnesses who testify to diametrically opposite things that the judge who hears the evidence may be entirely satisfied that one is telling the truth and the other is not. This is the paramount reason why appellate courts are disinclined to reverse findings of fact. The appearance and demeanor of the witnesses here may have been and probably was such that the court was convinced that the plaintiff was telling the truth. There were but two witnesses on the point, and the circuit judge after seeing and hearing them accepted the plaintiff's evidence as true, and we do not think it should be said that such a conclusion is against the clear preponderance of the evidence.

2. The interest on the bonds was payable semi-annually, and as interest coupons became due they were sent by the plaintiff to the defendant, who collected the same up to and including January 1, 1907, and sent his personal check to the plaintiff for the amount of the interest so collected. Thereafter the Granite Company defaulted in the payment of the interest on the bonds. No other amount was paid by the defendant on the loan. If these payments interrupted the running of the statute of limitations, it is conceded that the action is not barred. If they did not, then it is conceded that the action is barred.

It is argued that the theory upon which it is held that payment tolls the statute of limitations is that it is an acknowledgment of the debt and that there was no such acknowledgment here because the defendant simply acted as a medium through which the Granite Company paid its debt. Accepting the appellant's statement of the law as being correct,

we cannot assent to the conclusion reached. It is true the Granite Company was paying its own obligation when it paid the interest coupons. It is none the less true that the defendant was paying his debt to the plaintiff when he forwarded his check for the amount so collected. Defendant owed plaintiff no other indebtedness and the coupons were sent to the defendant at his own request.

*By the Court.*—Judgment affirmed.

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STATE EX REL. KLEINSTEUBER, Respondent, vs. KOTECKI, Comptroller, Appellant.

*October 29—November 18, 1913.*

*Officers: Resignation: When vacates office without acceptance:* De facto *officer: Right to salary: Receipt of pension: Municipal corporations: Fixing salary of new office: Time: Fire and police commission: Commissioners to belong to different political parties: Constitutional law.*

1. Where the term of an officer is during good behavior, subject to removal for cause, and there is no provision that he shall hold until his successor qualifies, the office becomes vacant under sec. 962, Stats., upon his resignation, without an acceptance thereof.
2. Where acceptance of the resignation of such an officer is refused and he continues to perform the duties of the office, he becomes a *de facto* officer and is entitled to the salary of the office if there is no *de jure* officer claiming it.
3. Under ch. 347, Laws of 1913 (amending sec. 925—31c, Stats.), the fact that a city officer is receiving a pension from a fund held by the city does not debar him from drawing the salary of his office.
4. In a statute (sec. 959—46*d*, Stats.: Laws of 1911, ch. 586) creating a board of fire and police commissioners in cities of the first class, a provision that not more than two of the five commissioners "shall at any time belong to the same political party" does not exclude any one from eligibility and does not render the law unconstitutional.

5. A municipal ordinance creating a new office, passed after the time at which the common council is required by law to fix all salaries, may nevertheless fix the salary of the office so created.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Wm. H. Timlin, Jr.,* and oral argument by *Mr. Timlin.*

*Moritz Wittig,* for the respondent.

VINJE, J. This is an appeal from a judgment granting a peremptory writ of *mandamus* commanding the defendant, as comptroller of the city of Milwaukee, to audit and countersign the pay rolls of said city for the months of April, May, June, and July, 1912, so far as the salary, at $150 per month, of the relator, as superintendent of the police and fire alarm system, is concerned. The defendant demurred to the petition for an alternative writ on the ground that it did not state facts sufficient to constitute a cause of action, and upon the court's overruling the demurrer judgment was granted as stated. The appeal raises a number of questions which will be briefly noticed.

1. It is claimed that the relator is not entitled to his salary because the petition shows that on the 25th of April he presented his resignation to the board of fire and police commissioners and that such resignation vacated the office. Counsel for relator cites a large number of cases holding that a resignation without an acceptance does not vacate the office, and counsel for defendant cite many cases holding the contrary. Fortunately, sec. 962, Stats. 1911, settles the controversy. It provides: "Every office shall become vacant on the happening of either of the following events: (1) The death of the incumbent. (2) His resignation. . . ." So it must be held that upon the filing of the resignation of the

relator the office was vacated, since his term of office was during good behavior subject to removal for cause. There was no provision in the act creating the office that he should hold till his successor qualified, so the case does not fall under the rule announced in *State ex rel. Wheeler v. Nobles,* 109 Wis. 202, 85 N. W. 367.

2. But the petition shows the board refused to accept the resignation and that the relator continued to exercise the duties of the office up to the time of filing the petition. He therefore became a *de facto* officer from the time his resignation was filed, and having performed the duties of the office, and there being no *de jure* officer claiming it, he was entitled to his salary under the rule of *State ex rel. Elliott v. Kelly,* 154 Wis. 482, 143 N. W. 153.

3. The objection that he was debarred from drawing a salary because he received a pension is negatived by ch. 347, Laws of 1913, amending sec. 925—31*c,* Stats., which provides:

"No officer or employee receiving a salary from any city, whether organized under general or special law, shall receive for service of any kind or nature rendered such city any compensation therefor other than the salary fixed and provided for such office. This act shall apply to all officials now serving or hereafter elected or appointed to public place. Provided, that for the purposes of this section moneys or funds held by any such city as pension funds shall not be considered or construed to be city money or funds, and that the payment to or receipt by any person of any money from any such funds shall not be construed as the payment or receipt of money or compensation from such city."

4. It is claimed that ch. 586, Laws of 1911 (sec. 959—46*d,* Stats.), which creates a board of police and fire commissioners in cities of the first class, and under which the relator was appointed, is unconstitutional, because it provides with reference to membership: "Not more than two of whom shall at any time belong to the same political party," and the

case of *Rathbone v. Wirth,* 150 N. Y. 459, 45 N. E. 15, is cited to sustain the claim. The provision there considered was that no person "is eligible to the office of police commissioner unless at the time of his election he is a member of the political party or organization having the highest or next highest representation in the common council," and it was held unconstitutional by a vote of four to three on the ground that it unlawfully limited the eligibility to the office to adherents of the two political parties having the highest representation in the common council, and was an unreasonable restriction upon local self-government. The case of *Rogers v. Buffalo,* 123 N. Y. 173, 25 N. E. 274, was referred to and distinguished. There it was held that a provision in an act creating a civil service commission that "no more than two of whom shall be adherents of the same party" was valid because it provided merely for diversity of representation and excluded no one, whether an adherent of any, or of no, political party, from being eligible. That is precisely the case at bar. The law does not exclude any one from eligibility. On the other hand, its aim is to compel reasonable diversity of representation. We are also referred to the cases of *Att'y Gen. v. Detroit Common Council,* 58 Mich. 213, 24 N. W. 887; *State ex rel. Holt v. Denny,* 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; and *Evansville v. State,* 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93. In *Att'y Gen. v. Detroit Common Council* the provision was for the appointment of election inspectors consisting of two persons from each of the two leading political parties, and it was held to be in violation of the Michigan constitution, because it recognized only two political parties and made it a necessity for the appointments to be made from, and confined to, the members of those parties. The New York court distinguishes the Michigan case from *Rogers v. Buffalo* on that ground, because in the *Rogers Case,* as in the case at bar, there is no requirement that any member shall be chosen from any political party,

nor does the provision in question disqualify one who belongs to *no* political party or make him ineligible. Instead of being restrictive it is distributive in its effect. In *State ex rel. Holt v. Denny, supra,* a provision that officers and patrolmen of a fire and police department should be selected equally between two leading political parties was held unconstitutional. The same provision was held unconstitutional in *Evansville v. State, supra.* The Michigan and Indiana cases are clearly distinguishable from the case before us, and we have no hesitation in holding the law constitutional.

5. The objection that the relator is not entitled to his salary because it was not fixed at the time when the charter requires the fixing of annual salaries is disposed of in favor of the relator by the case of *State ex rel. Elliott v. Kelly,* 154 Wis. 482, 143 N. W. 153.

A number of other points are raised by the defendant, but they do not seem to be of sufficient importance to merit separate treatment. They have all been considered and held not to affect the merits of the judgment appealed from.

*By the Court.*—Judgment affirmed.

TIMLIN, J., took no part.

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ADAMS, Respondent, vs. THE BUCYRUS COMPANY, Appellant.

*October 29—November 18, 1913.*

*Adverse witnesses: Cross-examination: Impeachment: Appeal: Prejudicial errors: Master and servant: Injury to employee: Negligence:* Res ipsa loquitur: *Evidence: Competency: Loss of sexual power: Damages: Services of wife as nurse: Excessive award.*

1. Where plaintiff has called and examined an employee of defendant as an adverse witness under sec. 4068, Stats., defendant has a right to re-examine such witness as to all matters tending to explain or qualify the testimony already given, though not as to new defensive matters, and may also ask the witness

questions proper for the purpose of impeachment, upon stating that he does not intend thereafter to make the witness his own.

2. Where such right is refused, the question on appeal is whether the error was so materially harmful that, had it not occurred, the result might probably have been different.
3. Where the witness so examined was the sole eye-witness of the accident in which plaintiff was injured, and immediately after such accident had made statements in writing which conflicted with his testimony in important particulars, and by the ruling of the court defendant is debarred from making use of such conflicting statements, the error should work a reversal.
4. In an action to recover for personal injuries caused by the fall of a steel roller forty-two inches in diameter, with a fifteen-inch face, and weighing two tons, which had been left standing upright upon such face on a sand floor, the doctrine of *res ipsa loquitur* is *held* not to apply, since it cannot be said, under the evidence, that the fall of the roller must necessarily have been caused either by a defect in the floor or by negligence in placing the roller itself.
5. Where plaintiff introduced evidence to support the theory that the fall of the roller was caused by vibrations of the earth resulting from the operation of a heavy drop for breaking castings, located about one hundred feet away, it was error to exclude evidence offered by defendant of experiments made with such drop and the fact that a pair of delicate scales attached to a brick wall about fifty feet away were not affected thereby.
6. Where no direct evidence can be adduced as to a loss of sexual potency resulting from a personal injury, the admission of conjectural evidence on the subject is error.
7. In an action for personal injuries, a reasonable sum for the services of plaintiff's wife in nursing him, not exceeding the amount for which plaintiff could have employed others to do the work, is a proper item of damages.
8. Plaintiff, earning from $90 to $95 per month, was so injured by the fall of a heavy roller upon him that he will never again be able to walk freely, or do heavy lifting or stooping, but will probably be able to walk with a cane and do many kinds of light work. At one time after his injury he had employment in which he earned $45 per month. *Held*, that an award of $18,300 was excessive, and that any award exceeding $12,000 should not be sustained.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

Personal injuries. The plaintiff, a millwright, nearly

forty years of age, was in the employ of defendant at its large manufacturing plant at South Milwaukee, and was very seriously injured February 3, 1911, by reason of a large roller falling upon him. The roller was in the shape of a solid wheel, forty-two inches in diameter, fifteen and one-half inches thick, made of semi-steel, and weighing nearly 4,000 pounds. The roller was a part of the machinery of a so-called sand mill or sand mixer, which was situated in the foundry annex of the defendant's plant and was used for mixing moulding sand. There are two sand mixers in the annex and each contains two of these large steel rolls, which revolve in a large pan, eight feet in diameter, into which the sand is thrown. The pan revolves horizontally and the wheels vertically, and the sand is thus thoroughly mixed. The rolls revolve on a shaft which runs through the middle, like the axle of a wheel, and the aperture through which this shaft runs is about six inches in diameter. The rolls become worn in time, and sometimes the metal bushings in the aperture, which serve to reduce the aperture to the size of the shaft, have to be replaced. Two days before the accident *Adams* with his helper, one Ranthum, was directed by Beck (his foreman) to put new bushings in the apertures of the rolls belonging to one of the sand mixers. The rolls had then been removed from the machine and were standing on their fifteen-inch rims or edges on the sand floor of the annex near the mixer. Plaintiff and Ranthum drove in bushings on one side of each of the rolls with a sixteen-pound sledge. The bushings were bands of iron which fitted closely in the aperture and reduced the size thereof from about six inches to about three inches, and were about six inches in length. They fitted very closely, and it was necessary to spend some time driving in each bushing, a block of wood being placed against the outer end of the bushing and struck repeatedly by the sledge. It took about four hours to put the bushings in one side of each roller, and plaintiff then tried to fit the

bushings into the apertures on the other sides of the rollers and found them too small. Plaintiff informed Beck, the foreman, of the fact and gave Beck the measurements of the hole, and Beck promised to have larger ones made. No work was done on the rollers the next day. In the evening of the last named day one Pfeiffer, who was a sand mixer on the night force, found the rollers in his way as he wheeled sand to the other sand machine, and he asked the man who operated the electric crane to move them away with the crane, which he did, placing them four or five feet to the south of their former positions, one being left about two feet from the concrete foundation of an iron column on the east side of the annex, and the other four or five feet west thereof, and both standing on their rims or edges, as before. On the following day, at about 9:30 a. m., plaintiff and Ranthum were sent back to complete their work on the rollers with the new bushings. They drove one of the new bushings about two inches into one of the rollers, when it seemed to hit a burr and stopped. Ranthum then went on the other side and drove the bushing out. Plaintiff got down on his hands and knees with a candle and looked in the hole to see what the obstruction was. While he was doing this Ranthum (as he testifies) took the other bushing and tried it in the aperture of the roller which stood near the column and tapped it lightly with the machinist's hammer, whereupon (according to Ranthum's testimony) the roll rolled a little northward and tipped over westward on to the plaintiff as he was kneeling, thus crushing him to the ground and inflicting very serious and permanent injuries. No one saw the roll fall except Ranthum.

The jury returned the following special verdict:

"(1) Was the plaintiff injured on February 3, 1911, by an iron roller falling upon him in the foundry annex of the defendant? *A.* (by the court). Yes.

"(2) Was the place where the plaintiff was at work when injured, reasonably safe considering the condition of the

material underneath the roller, which fell on him, the position and character of that roller and the nature of the work in hand? *A.* No.

"(3) If you answer the second question 'No,' then answer this question: Did the defendant know in time to have prevented the injury to plaintiff that the place where he was at work was not reasonably safe? *A.* Yes.

"(4) If you answer the third question 'No,' then answer this question: Ought the defendant, in the exercise of ordinary care, to have known in time to have prevented the injury to plaintiff that the place where he was at work was not reasonably safe? *A.* Yes.

"(5) If you answer the second question 'No,' then answer this question: Was such failure to provide a reasonably safe place for the plaintiff to work in, the proximate cause of his injury? *A.* Yes.

"(6) If you answer the second question 'No,' then answer this question: Ought the plaintiff, in the exercise of ordinary care, to have known that the place in which he was working at the time of the injury was not reasonably safe? *A.* No.

"(7) Did any want of ordinary care on the part of the plaintiff proximately contribute to produce his injuries? *A.* No.

"(8) Was Emil Ranthum guilty of negligence in his attempting to put the bushing in the roller that fell on the plaintiff? *A.* No.

"(9) If you answer the eighth question 'Yes,' then answer this question: Was such negligence on the part of Emil Ranthum the proximate cause of plaintiff's injury? *A.* No.

"(10) What sum will reasonably compensate the plaintiff for the damage sustained by him as a result of his injury? *A.* $18,300."

The court overruled defendant's motions to change certain answers and for judgment, and entered judgment on the verdict for the plaintiff, from which judgment defendant appeals.

For the appellant there were briefs by *Doe & Ballhorn,* attorneys, and *W. C. Quarles,* of counsel, and oral argument by *Mr. Quarles* and *Mr. J. B. Doe.*

*J. H. Stover* and *J. S. Stover,* for the respondent.

WINSLOW, C. J. In this case the plaintiff called as adverse witnesses a number of the defendant's employees, including Ranthum, the plaintiff's helper, and examined them fully as to the situation and the circumstances surrounding the accident. Ranthum gave his story of the falling of the roller at length. The trial took place in November, 1912, and the trial judge ruled in accordance with the rule apparently laid down in *O'Day v. Meyers,* 147 Wis. 549, 133 N. W. 605, that the defendant could not cross-examine Ranthum or any of the other witnesses who were employees of the defendant and were called as adverse witnesses. This was error under the decision in *Guse v. Power & M. M. Co.* 151 Wis. 400, 139 N. W. 195, which case, however, was not decided until December, 1912. In this latter case it was held that the defendant has a right to re-examine such a witness immediately after the close of the plaintiff's examination as to all matters tending to explain or qualify the testimony already given, but not as to defensive matters not brought out by plaintiff's counsel, and may ask the witness questions proper for the purpose of impeachment, upon stating that he does not intend thereafter to make the witness his own.

The question is whether such error was reversible error, *i. e.* does it appear that it affected the substantial rights of the appellant (sec. 3072*m,* Stats. 1911), or, to express the thought in other language, does it appear affirmatively that the error not only harmed the appellant, but harmed him so materially that it might probably have changed the result of the case? *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179. In several cases this precise error has been held nonprejudicial under the circumstances present in those particular cases. *Jakopac v. Newport M. Co.* 153 Wis. 176, 140 N. W. 1060; *Baermann v. Chicago & M. E. R. Co.* 153 Wis. 235, 140 N. W. 1119; *Nickels v. Manitowoc S. & D. D. Co.* 153 Wis. 298, 141 N. W. 269.

We are unable, however, to reach that conclusion in the present case, at least in respect to the examination of the wit-

ness Ranthum, who was the only eye-witness of the fall of the roll. The plaintiff himself did not know nor see what struck him. So the testimony of Ranthum was of the greatest importance in the case. Upon his credibility much depended. He testified, on his examination as an adverse witness, that the sand was eight or ten inches deep where the roller stood when it fell over; that the place where it was standing was about eight inches higher than the place where *Adams* was kneeling down; that the sand that was about eight or ten inches deep extended about five feet into the room from the wall, that it declined a little from the wall,—it was gradually down from where it was eight or ten inches deep to where there was practically no sand towards the west from the wall (this was towards *Adams*); that he (Ranthum) was trying the bushing in the roller that fell over to see whether it would fit; that the stone moved a little—"a little roll like"—toward the north and then tipped over westward toward *Adams,* and made a furrow with its edge fifteen or eighteen inches long in the sand. On examination by the defendant, when called as a witness for the defendant, he stated that when he was trying the bushing he tapped it lightly with a machinist's hammer twice, and that then the roller moved and tipped. The natural conclusion from this evidence seems to be that the roll was standing on a sloping surface of sand several inches deep, and standing so insecurely that a slight tap with a machinist's hammer caused it to topple over. The defendant offered to show, however, that Ranthum had previously made three written statements as to the facts which differed very materially from his statements on the witness stand. In the first of these statements, made on the day of the accident, he appears to have said:

"I was working on one roller and *John Adams* on the other; I was driving in the bushing with a light sledge, and all at once the roller fell over and struck *Adams* across the back; it was impossible to have the rollers in a better position

as they were placed solid, and from my point of view could not tip."

In the second signed statement, made May 1st following, he appears to have said:

"The floor on which the rollers stood was made of sand and was level, without any holes in it. . . . The floor was so level that it is all a man can do to roll them (the rollers), consequently blocks are not necessary. . . . I was driving in the bushing in the roller with a sledge when my roller tipped over on *Adams.*"

In the third statement, made November 7, 1912, he appears to have said:

"The higher part of the floor on which the rollers were placed was solid as far as I could see. They wheeled wheelbarrows over it and the tracks of the wheels did not show. The foot marks did not show on the sand. As far as I could see and as far as I know the floor where the rollers were placed (the higher part) was solid. It was level."

The defendant was absolutely debarred from examining Ranthum when called as an adverse witness by the plaintiff, and was thus denied the right which it had to lay the foundation for the introduction of these statements as evidence impeaching his credibility. When the defendant took the case it examined Ranthum as its own witness, but on offering to introduce the written statements they were ruled out. This latter ruling was abstractly correct under the general rule that a party cannot impeach his own witness, but the net result of the two rulings was to exclude the statements completely from the case, when the defendant had the right to have the jury consider them as impeaching Ranthum's credibility, and the defendant had made every effort in season and out of season to get them in.

Were this the case of a minor witness or a minor fact we might well conclude that we could not say affirmatively that there had been prejudice to a substantial right, but here is

the only witness in the case who actually knows what happened. He practically states upon the trial that the falling roll stood on several inches of sloping sand and that the merest touch tipped it over, and it seems that the jury must have believed this evidence in order to return the verdict which they did. Immediately after the accident, however, he stated in writing that the floor was level and solid, and that he was driving the bushing in with a sledge when the roller tipped over. If these positive statements, utterly at variance with his present testimony and made by the witness when the transaction was fresh, had been placed before the jury, it seems to us that it can hardly be doubted that the result of the case might very probably have been different.

We do not regard the case as a case to which the doctrine of *res ipsa loquitur* applies. It could not be called negligence as a matter of law to have a sand floor in a room of this kind, nor to have the roller standing on sand, nor can one say that the fall of the roller must necessarily have resulted from any defect in the floor, nor in the placing of it. If the roller was slightly inclined when Ranthum began to fit the bushing in the hole, we cannot say that a very moderate amount of striking on the bushing might not so disintegrate the sand and cause it to slip away under the opposite edge of the roller as to produce the result which actually was produced by *some* agency in the present case. In a word, we do not feel that we can say that the roller must have fallen either because the floor was negligently constructed or the roller itself negligently placed.

This conclusion necessitates reversal and new trial. A number of other errors are assigned by the appellant, some of which will be briefly treated. Those which are not treated must be considered as overruled. We should be slow to reverse the judgment on account of any of them standing by themselves.

At the time of the accident there was located outside of the annex, at a distance of about 125 feet, an apparatus known as a foundry drop, used for breaking up castings. It consisted of a heavy metal bulb which was raised forty feet or more from the ground and dropped upon the casting which was to be broken. There was some testimony to the effect that when the drop was in use one could feel the jar in the ground at the sand mixers. The object of the introduction of this evidence by the plaintiff was to justify the idea or conclusion that the jar or vibration of the ground caused by the foundry drop might have caused a vibration of the sand under the west side of the roller and resulting in a movement of loose sand out from under the roller. In order to meet this inference of fact, the defendant offered to prove the results of an experiment made at about the time of the trial with a pair of delicate scales located in the chemical laboratory of the works about fifty feet from the drop. These scales stood on an oak bench built into the wall of the building, which wall rested on a concrete foundation resting on the ground, and they record a weight of 1-560 of an ounce, and are so delicate that any slight jar upon the bench would appreciably disturb the balance. The offer was to show that the foundry drop was operated while the witnesses called were watching the scales, and that the scales were not in the least affected. There was also an offer to show by the person who had operated the scales for several years that they never had been affected by the drop in the slightest degree. This testimony was all ruled out, and, as it seems to us, erroneously. The scales were about half as far from the drop as the roller and were shown to be directly connected with a solid wall standing upon the ground. Common knowledge tells us that any appreciable tremor in the ground is communicated to a wall standing thereon, and that it must necessarily affect the balance of such delicate scales as the scales in question.

Two physicians were examined as experts, and while neither of them could say that in his opinion the plaintiff's sexual potency was affected, one was allowed to testify that the plaintiff had told him that such was the case, and the other was examined at length as to the location of the nerves controlling the sexual powers with reference to the injuries received by the plaintiff. It seems that it was purely conjectural whether there was any injury to the sexual powers at all. If there was such injury, it is at best but a single element in the general condition of physical enfeeblement resulting from the injury. It is proper to be shown, undoubtedly, where direct evidence can be adduced to show it, but the danger that the jury will consider it as a separate element of damage and thus duplicate damages is so great that this court has twice referred to and disapproved of conjectural evidence of this nature. *Bucher v. Wis. Cent. R. Co.* 139 Wis. 597, 120 N. W. 518; *Krawiecki v. Kieckhefer B. Co.* 151 Wis. 176, 138 N. W. 710. Attention is called to the rule laid down in these decisions, in case of another trial of this case.

The general claims are made by the defendant that the evidence shows as matter of law that there was no negligence by the defendant and that the plaintiff not only assumed the risk but was guilty of contributory negligence. These contentions are all overruled, and it is not deemed necessary to discuss them.

The charge of the court permitted the jury to allow a reasonable sum for the services of plaintiff's wife in nursing him, not exceeding the amount for which plaintiff could have employed others to do the work. This ruling is assigned as error, but we do not find it to be erroneous. It is in accord with the decisions of this court in *Crouse v. C. & N. W. R. Co.* 102 Wis. 196, 78 N. W. 446, 778, and *Johnson v. St. Paul & W. C. Co.* 131 Wis. 627, 111 N. W. 722, nor is the

doctrine of these cases changed by the case of *Milwaukee v. Miller,* 154 Wis. 652, 144 N. W. 188.

We regard the damages awarded by the jury as excessive. The plaintiff was earning at the time of his injury thirty cents an hour for a ten-hour day, and sometimes worked overtime. He thought he averaged $90 to $95 per month. He walks now with crutches, will never be able to walk freely, nor do heavy lifting or stooping, or work requiring dexterity, but will probably be able to walk with a cane and do many kinds of light work. During the summer of 1912 he had employment at the public bathhouse in Bayview as attendant, giving out keys of lockers, and earned $45 per month. Without going into the matter in detail, we hold that under the present evidence a verdict exceeding $12,000 should not be sustained.

*By the Court.*—Judgment reversed, and action remanded for a new trial.

BARNES, J., dissents.

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FRED MILLER BREWING COMPANY, Respondent, vs. CITY OF MILWAUKEE, Appellant.

*October 29—November 18, 1913.*

*New trial: Discretionary order: Appeal: Streets: Unlawful change of grade: Injury to property.*

An order granting a new trial on the ground that the verdict is contrary to the evidence is a discretionary one and will not be disturbed upon appeal unless it clearly appears to have been an abuse of judicial authority. So *held* in a case where the jury found that plaintiff's property was not depreciated by an unlawful change in the grade of the street resulting from the construction of a viaduct.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action to recover damages for an alleged illegal change of grade. The property owned by plaintiff was affected by the construction of a viaduct, substantially as in *Pabst B. Co. v. Milwaukee* and *Joseph Schlitz B. Co. v. Milwaukee,* 148 Wis. 582, 133 N. W. 1112, and *Gross C. Co. v. Milwaukee,* 148 Wis. 72, 134 N. W. 139. The structure alleged to have caused damage in those cases is the one said to have injured plaintiff's property. The court found, as matter of law, that the street was constructed to a duly established grade, at the expense of plaintiff's property, and the grade thereafter illegally changed by construction of the viaduct, as in the cases referred to, and, therefore, submitted to the jury only the question of damages. The jury found, specially, that the value of plaintiff's property was not depreciated by the change of grade. The court, on notice, set aside the verdict as against the clear preponderance of the evidence and the justice of the case, and granted a new trial on condition of plaintiff paying the taxable costs of the first trial. Defendant appealed.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.*

For the respondent there was a brief signed by *Quarles, Spence & Quarles,* and oral argument by *Wm. C. Quarles.*

MARSHALL, J. Notwithstanding the skilful analysis by appellant's counsel to demonstrate error of the trial court in holding that the evidence established an illegal change of grade injuriously affecting respondent's property, it is not convincing. There is no need to follow such analysis in detail or demonstrate the correctness of the decision below. Suffice it to say, that, as we view the record, it does not clearly condemn such decision. To what extent the change

injuriously affected respondent's property is a jury question subject to control by the trial court to prevent injustice.

Whether the trial court erred in granting a new trial because the verdict was contrary to the evidence is ruled in respondent's favor by the principle that an order in that regard is discretionary and will not be disturbed on appeal unless clearly granted in abuse of judicial authority.

*By the Court.*—The order is affirmed.

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HOEFER and another, Respondents, vs. CITY OF MILWAUKEE and others, Appellants.

*October 30—November 18, 1913.*

*Appeal: Orders: Service of copy, etc.: Several orders in one appeal: Dismissal as to one: Affirmance and reversal:* Res judicata: *Municipal corporations: Streets: Resurfacing: Special assessments: Validity: Pleading: Statute construed.*

1. Although strictly, under sec. 3042, Stats., a copy of an order should be served with the notice of entry thereof, the statute is satisfied by service of the copy at one time and the notice of entry at a later date.
2. If an appeal embracing two or more orders is ineffective as to one of them because taken too late, it will be dismissed as to that one but held effective as to the others.
3. Where the appeal from one order in the cause is ineffective and such order, being still in force, concludes the subject matter of a later order, such later order should be affirmed although properly appealed from.
4. Where a special assessment for resurfacing a street is authorized by statute upon presentation of a certain petition, the complaint in an action to set aside such assessment as unauthorized and illegal should expressly negative the presentation of such a petition.
5. The words "or curbing or resurfacing of such street or avenue," added to sec. 959—35, Stats., by ch. 185, Laws of 1911, refer to any street or avenue in the cities there specified, and not merely to streets or avenues which have been improved with

**a permanent pavement having a concrete foundation; hence under that statute any such street or avenue may be curbed or resurfaced and the expense, not exceeding the statutory limit, assessed against the abutting property.**

APPEAL from three orders of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Dismissed as to one; one affirmed; one reversed.*

For the appellants there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.*

For the respondents there was a brief by *Rowan, Kalaher & Stoecker,* and oral argument by *F. J. Rowan.*

TIMLIN, J. This appeal covers three orders made in the above entitled cause. One of these orders was made on February 18, 1913, and it granted or continued an injunction *pendente lite* and also relieved plaintiffs from paying the assessment in question as a condition precedent to maintaining the action. Service of a copy of this order upon defendants was begun February 18 and completed February 19, 1913. A notice of entry of the order was separately served on defendants March 11, 1913. The second order appealed from was made April 5, 1913, and it denied defendants' motion to dismiss the cause made on the ground that plaintiff had not paid the assessment. The third order appealed from was made on April 5, 1913, and overruled defendants' demurrer to the complaint. The appeal was taken on April 14th of the same year. Under such circumstances the appeal cannot be wholly dismissed because by sec. 3049, Stats., an appeal may embrace two or more appealable orders, and if it is ineffectual as to any order included in the appeal that does not avoid the appeal. Strictly the copy of the order should be served with a notice of entry thereof. Sec. 3042, Stats. But we think the statute is satisfied by service of the copy at one time and the notice of entry

thereof later, as was done in this case. A copy of the first mentioned order and notice of entry thereof having been in this manner served more than thirty days prior to the appeal from such order, that portion of the appeal is ineffective and the appellants are entitled to no review of that order in this court. This is equivalent to a dismissal of the appeal as to that order.

With reference to the second order it must be affirmed on this appeal because the order first mentioned is in force and unreversed and concludes the subject matter of the second order, so that the second order was properly made.

This brings us to the merits of the order overruling the demurrer. The complaint describes the parties and the premises and avers that the street in question was in good condition and repair "prior to and at the time of resurfacing thereof and work thereon and pretended assessment therefor." It is averred that the street had been, prior to this last assessment, graded and graveled and the gutters paved and the sidewalks laid and curbing done, all to the established grade. This was paid for by special assessment on the abutting property. The charter provisions requiring improvements subsequent to the first to be paid out of the city or ward funds are referred to, and then:

"On the 26th day of February, 1912, the department of public works sent to the common council of said city a recommendation for doing the following work on said street: 'resurfacing the roadway with macadam, curbing the sidewalk with stone (old curb, if possible, to be reset) and doing all the necessary grading pertaining to the above work,' accompanied by a resolution to that end, which resolution was referred by said common council to the committee on streets and alleys thereof, and thereafter such proceedings were taken by said common council, mayor, and department of public works that a pretended assessment of benefits and damages was made and assessed against said premises on account of said resurfacing and work."

The letting of the contract and some of its stipulations, the specifications and some of their requirements, the lack of knowledge of the plaintiff that a special assessment had been made "until the partial completion of said resurfacing and work," the acceptance of the work, and the issue of assessment certificates to the contractor, are averred. The portion of the specifications quoted and that averred in substance are as follows:

"Said contract and specifications provided that: 'the grading will consist of the plowing-up, scarifying, or otherwise loosening the present surface of the street to the depth of about four inches,' as expressed therein, and provided for the rolling thereof and for the resurfacing with a two-inch layer of crushed stone and bituminous road binder when thoroughly rolled, constituting said resurfacing."

It is also averred that the assessment is void and wrong and fraudulent and unconstitutional, but the complaint does not tell us why, except as above stated. This pleading therefore presents the broad proposition that where a street has been once made and graded to the established grade line and the cost assessed on the abutting property, no further special assessment can be made on the abutting property for benefits arising from such resurfacing as is therein described. Ch. 241, Laws of 1903, applicable to the city of *Milwaukee,* does authorize such special assessment whenever a petition is presented to the common council by residents of the city "owning a two-thirds majority of the feet in front of all the lots fronting upon such proposed improvements." There is nothing in this complaint to negative the fact that such petition was presented in the instant case, hence the complaint fails to show affirmatively, as it should, that the special assessment complained of is illegal.

Further, ch. 185, Laws of 1911, otherwise sec. 959—35, Stats., provides as follows:

"No property fronting on any street or avenue in any city of the first, second, or third class shall be exempt from any

assessment of benefits on account of the paving of said street or avenue with a permanent pavement, having a concrete foundation or the curbing or resurfacing of such street or avenue, until such property shall have paid," etc.

If the words "such street or avenue," found in the provision relative to curbing or resurfacing, relate to the prior words "said street" and through these words back to the words "any street or avenue in said city," then the power is given to curb or resurface any street and make a special assessment therefor, except where the property has already paid a stated amount in special assessments. On the other hand, if the words "such street" refer solely to streets "having a concrete foundation," only the latter may be curbed or resurfaced under the statute last mentioned. The provision relative to curbing or resurfacing was inserted in this statute by amendment. Ch. 185, Laws of 1911. If the word "or" preceding the word "curbing" and the "or" preceding the word "resurfacing" are used in the distributive or disjunctive sense, we have a provision that the exemption shall not apply, first, to making a permanent pavement on a concrete foundation; nor, second, to the curbing of a street; nor, third, to the resurfacing of a street. If paving includes curbing and resurfacing, then the amendment of 1911 was unnecessary and futile and the words "or curbing or resurfacing" add nothing to the statute as it existed before the amendment.

In *Loewenbach v. Milwaukee,* 139 Wis. 49, 119 N. W. 888, it was held that the word "paving" in sec. 6 of ch. VII of the Milwaukee charter included repaving. *Wistar v. Philadelphia,* 80 Pa. St. 505, 511, is cited in support of that construction. That case also holds that authority to pave includes curbing, which is a necessary part of paving a street. Pavement includes flagging as well as other improvements making a smooth surface for streets and sidewalks. *Matter of Burmeister,* 76 N. Y. 174, 181. Also the construction of gutters. *Warren v. Henly,* 31 Iowa, 31, 36; *Matter of*

*Grube,* 20 Hun, 303, 304. The word includes all things necessary to make a level and convenient surface for horses, carriages, and foot passengers of any convenient, common, or practical material and all necessary excavation or filling to prepare the surface and removal of obstacles as well as laying the paving stones or other surface material. *Buell v. Ball,* 20 Iowa, 282, 290. The power to pave the city streets conferred upon the common council by charter includes curbs, sidewalks, gutters, trimmings, and grading. *Jacquemin v. Finnegan,* 39 Misc. 628, 80 N. Y. Supp. 207, 209, citing Elliott, Roads & Streets (2d ed.) § 461 (see 3d ed. § 552); 2 Dillon, Mun. Corp. (4th ed.) § 780, note 1 (and see 5th ed. vol. 4, § 1447).

Prior to the amendment of 1911 the statute declared that property there described should not be exempt from any assessment of benefits on account of the paving of the street in front with a permanent pavement having a concrete foundation until, etc. This would include curbing and resurfacing as part of the pavement, provided it was all done on a concrete foundation and was a permanent pavement. The respondents here attempt to give the statute this same construction after the amendment of 1911. Rules of construction require us to give some force and effect to the amendment, and although the words "curbing or resurfacing of such street or avenue" might otherwise be taken to refer to a street or avenue having a concrete foundation, yet the statute will also bear a construction which will give the amendment of 1911 some significance and some effect. The amendment of 1911 also added the following:

"In cities of the first and second class exemption shall extend only to and include one half of the cost of such pavement, curbing, or resurfacing in excess of three dollars per square yard and only one half the cost of any subsequent pavement, repavement, or resurfacing of such street or avenue."

This indicates that the pavement, curbing, and resurfacing are separately provided for, and a recognition that after a pavement or curbing or resurfacing there may be either a subsequent pavement, a repavement, or a resurfacing, part of the cost of which may be assessed on abutting property although the street in question had theretofore been constructed to the grade established by the common council. Here the words "cost of any subsequent pavement, repavement, or resurfacing of such street or avenue" evidently mean any street or avenue in any city of the first or second class and are not limited to streets or avenues with a permanent pavement having a concrete foundation. The statute therefore must be held to mean that the exemption is taken away from abutting property to the extent stated, in three cases: first, paving with a permanent pavement on a concrete foundation; second, curbing; and third, resurfacing. "Such street or avenue," therefore, means the same as the prior expression "said street or avenue," and refers to a street or avenue in any city of the class mentioned.

Tested by this statute so construed, the complaint also fails to state a cause of action. Hence as to the first mentioned order the appeal should be dismissed, the second order should be affirmed, and the third order reversed, and the cause remanded for further proceedings according to law. The appellants should pay the clerk's fees. No other costs to be allowed.

*By the Court.*—It is so ordered.

BURNHAM, Respondent, vs. CITY OF MILWAUKEE, Appellant.

*October 30—November 18, 1913.*

*Pleading: Answer: Demurrer: Municipal corporations: Milwaukee charter: Streets: Unlawful change of grade: Damages: Special assessments: Reassessment: Taking private property without compensation: Area under sidewalk: Failure to compel contractors to finish work on time: Liability of city.*

1. A pleading which attempted to combine an answer with several demurrers to the complaint should have been stricken out by the trial court.
2. Where a complaint states but one cause of action, the nature of the action is to be determined by the predominant facts stated.
3. A demurrer will not lie to mere surplusage not attempted to be set forth as a separate cause of action, nor to a sentence, nor to a part of a cause of action; but the plaintiff cannot avoid a demurrer to separate causes of action, if there are such, merely by joining them in one count of the complaint.
4. An action to recover damages for an unlawful change of a street grade and to recover money paid upon an illegal assessment certificate issued thereon, is, under present statutes, in effect an action for a reassessment, and based upon such cause of action there can be no recovery for private property taken for public use without compensation, nor for the incumbering or blocking of streets by contractors.
5. Construed liberally—as required by sec. 2649*a*, Stats. (Laws of 1911, ch. 354),—the complaint in an action against a city is *held* to state a cause of action for an unlawful taking by defendant, in changing the grade of a street, of private property of plaintiff without resorting to condemnation proceedings or making compensation therefor, such property being a part of an area or basement lying outside of the limits of the street.
6. The same complaint is *held* also to state a cause of action for damages and for a reassessment, it being alleged that the established grade of the street was changed and that no assessment of benefits and damages sustained by the owners of the property adjacent and abutting upon the street was made prior to the letting of the contract for the work as required by law (Milwaukee City Charter, ch. VII, secs. 6–10),—although it also shows that such an assessment was made at some later time.
7. If plaintiff recovers in such action for unlawful taking of his private property, such damages cannot be duplicated under the cause of action last above mentioned.

8. If, however, the part which was taken of the basement or excavated area was under the sidewalk and in the street, plaintiff cannot recover such damages as if it were his private property, but it is to be treated as any other convenience of a temporary character which he was rightfully enjoying and had the right to enjoy until the city lawfully terminated such right, and for its loss by an unlawful change of grade he is entitled to recover the diminution in value of his property with its lawful appurtenances, after due allowance made for benefits.
9. Under the Milwaukee city charter, no petition of abutting property owners need be presented to the common council prior to the enactment of an ordinance changing the established grade of a street. The provisions of sec. 6, ch. VII, of the charter relate to a petition at a later stage of the proceedings.
10. Although municipal contracts for the construction of a bridge and tunnel each prescribe a time for completion of the work and a per diem penalty for delay, the mere omission of the city to enforce such penalty or to compel the contractors to complete the work, even though it results in injury to an abutting property owner by permitting the street to be incumbered, preventing his use of the street and bridge, and impairing or preventing access to his premises for a longer time than necessary, will not render the city liable in damages to such property owner.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The appeal is from an order overruling several demurrers to the complaint.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.* They contended, *inter alia,* that the city was not liable to plaintiff for damages for interference with his basement under the sidewalk, especially where it was not charged with notice of its existence, citing *Jennings v. Johonnott,* 149 Wis. 660, 135 N. W. 170; *Milwaukee-Western F. Co. v. Milwaukee,* 152 Wis. 247, 260, 139 N. W. 540; *Sanderson v. Herman,* 108 Wis. 662, 84 N. W. 890, 85 N. W. 141; *Deshong v. New York,* 74 App. Div. 234, 77 N. Y. Supp. 563, affirmed 176 N. Y. 475, 68 N. E. 880; *Lawler v. Brennan,* 150 Wis. 115,

134 N. W. 154, 136 N. W. 1058; *Babbage v. Powers,* 130 N. Y. 281, 29 N. E. 132; *Calder v. Smalley,* 66 Iowa, 219, 23 N. W. 638; *Shelton Co. v. Birmingham,* 61 Conn. 518, 24 Atl. 978; *Winter v. Montgomery,* 83 Ala. 589, 3 South. 235; 3 Dillon, Mun. Corp. (5th ed.) §§ 1178–1180; 3 McQuillin, Mun. Corp. § 1343.

For the respondent there was a brief by *Marshutz & Hoffman,* and oral argument by *J. H. Marshutz.*

TIMLIN, J. The complaint purports to state one cause of action. Defendant's counsel has discovered therein five ineffective attempts to state five causes of action and has interposed a combination of answer and five demurrers in one instrument. This mode of pleading is irregular and should have been stricken out by the trial court, but that court proceeded to rule on the demurrers and we do also. The only pleading on the part of the defendant is either a demurrer or an answer, not both. Sec. 2648, Stats. If, as claimed by respondent's counsel, the complaint states but one cause of action, the nature of the action should be determined by the predominant facts stated, and so construing the complaint the action would be one to recover damages for an unlawful change of grade and to recover money paid upon an illegal assessment certificate issued thereon. This is, under present statutes, in effect an action for a reassessment, and based upon such cause of action there could be no recovery for private property taken for public use without compensation, no recovery for incumbering or blocking the streets by contractors, and only a recovery of the lawful measure of damages appropriate to such cases. It is therefore well to consider the complaint also from the viewpoint of appellant's counsel.

A demurrer will not lie to mere surplusage not attempted to be set forth as a separate cause of action, nor to a sentence, nor to a fragment of a cause of action. But the plaintiff can-

not avoid a demurrer to separate causes of action, if there are such, merely by joining them in one count of the complaint. We are unable to discover more than three attempted causes of action, namely: one to recover a special assessment of benefits paid and to recover damages on account of an unlawful change of grade; another to recover for the taking of private property for public use without compensation; and a third to recover against the city damages caused by obstruction of the street in front of plaintiff's premises and delay in building a bridge and tunnel and not compelling the contractors to proceed within the time limited in their contracts. Because the location and situation of the real estate in question is involved in each of the three alleged causes of action, it will tend to clearness to take up first that alleged cause of action relating to the taking of private property without compensation.

It is impossible to tell with any certainty from the complaint on which side of Ferry street this property lies. Defendant's brief states that the property is on the east side of Ferry street and its counsel so understand the complaint. The respondent's brief says that the property is on the northwest corner of South Water street and Ferry street, which would bring it on the west side of Ferry street, and respondent's counsel so understand the complaint. The complaint avers that the premises abut on Ferry street on the east, but whether that is on the east of the street or on the east of the premises is pretty hard to tell. Another averment of the complaint describing an area under the sidewalk enjoyed by plaintiff prior to the last grading avers, "the east wall of said basement was built of solid stone to a depth of eight (8) to ten (10) feet from the street level, said wall being at the west edge of said street as then laid out." If plaintiff's premises were on the east side of the street, this would carry us clear across the street to the west side and the area excavation would not be wholly under the sidewalk, so that

this would indicate the plaintiff's premises were on the west side of the street and his east wall of the excavated area under the sidewalk. It is further averred that "the said stone wall forming the eastern boundary of plaintiff's basement was torn down, and there was erected in its place a concrete wall, not in the same place as that of the stone wall taken down, however, but several feet to the westward, thereby cutting off and depriving this plaintiff of that much space in his said basement." This would also seem to indicate that plaintiff's property abutted on the west side of the street, so that a westward movement of the eastern wall would diminish the space formerly inclosed. The complaint also avers:

"No petition was made for the purpose of condemning plaintiff's land or no resolution of the common council was had in the matter, as by statute made and provided, and in other respects the law was not followed in the matter of taking this land, and therefore such taking was absolutely unlawful and illegal and damaged the plaintiff in the sum of five hundred dollars ($500)."

This presents very significant indications of a rather clumsy attempt to state a cause of action for an unlawful taking of private property of the plaintiff. If his property abutted on the west side of the street and his east area wall was at the west edge of the street as then laid out, the whole area was west of the west street line and was private property, yet plaintiff makes no such claim in his brief. It would aid this alleged cause of action to hold that the property in question abutted on the west side of Ferry street, and we must give the complaint that construction if necessary to support a cause of action. We think the complaint will bear that construction, and consequently that a cause of action is stated for taking, without resorting to condemnation proceedings or making compensation, the private property of the plaintiff which lay west of the west line of the street. Whether

this can be proven is an entirely different question and not before us on this demurrer. Ch. 354, Laws of 1911 (sec. 2649*a*, Stats.), provides that in case of a general demurrer to a complaint, if upon the facts stated, construing the pleading as provided in sec. 2668, plaintiff is entitled to any measure of judicial redress, whether equitable or legal and whether in harmony with the prayer or not, it shall be sufficient for such redress; while sec. 2668 provides that in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties. Although it encourage confusion we must observe these statutes, and, so doing, the demurrer must be overruled or disregarded as to this probable cause of action.

2. In support of another alleged cause of action, we find in the complaint averments tending to show that the plaintiff owns property abutting on Ferry street and that the grade of that street had been fixed by ordinance and the street graded up to the line so fixed, and that thereafter and for the purpose of making an approach to a new bridge across the Milwaukee river, which river adjoins plaintiff's property on the north, the common council by ordinance introduced on April 13, 1908, and passed on June 22, 1908, changed the grade of that part of Ferry street upon which plaintiff's property abutted, and thereafter the city graded Ferry street to this new or changed line, causing damage to the plaintiff. It is averred, apparently in order to invalidate said ordinance changing the grade, "that no petition was presented prior to the enactment of such ordinance signed by the residents of said city owning a majority of the feet in front of the lots upon said proposed improvement." No such petition is required by law. The provisions of sec. 6, ch. VII, of the charter relate to a petition at a later stage of the proceedings, but the complaint contains no averments sufficient to show that the petition there mentioned was omitted, even

if it could be said to be required in the instant case. It is also averred, apparently for the purpose of invalidating the assessment, that "no assessment of benefits and damages sustained by the owners of the property adjacent and abutting upon said street, by reason of the change of grades of said street, was made prior to the letting of the contract as by law provided." It is manifest that this is not intended to negative the fact of any assessment of benefits and damages, because elsewhere in the complaint it appears that such assessment was made and the benefits exceeded the damages and they were paid by the plaintiff, and he seeks to recover this payment. So that the averment relative to the omission of assessment of benefits and damages must mean that such assessment was made at some time, but was not made prior to the letting of the contract for the work of grading up to the new grade line. Sec. 8 of ch. VII of the city charter provides that "the owner of any lot or parcel of land which may be affected or injured in consequence of such alteration of grade, shall be entitled to compensation therefor; and it shall be the duty of the board of public works, before ordering to be done the work of actually changing such established grade by excavating or filling such street to the new grade as so altered, and at the time of making their assessment of benefits, as provided in the next preceding section, to consider, determine and assess against the lots which they may deem benefited by the proposed improvement, to the amount of such benefits, the damages, costs and charges, including the cost of such improvement—arising from such alteration of grade." The preceding sec. 7 of ch. VII provides that before ordering any work to be done by the owners of lots or lands fronting on the same an assessment of benefits and damages shall be made, and that the board shall indorse their decision and assessment in every case on the estimate of the cost of such improvement filed in their office. Sec. 10 of ch. VII, requiring the board of public works as soon as their

assessment is confirmed by the common council to enter into a contract for the work, was a later amendment and qualifies that part of sec. 7 which speaks of the work to be done by the lotowners. The estimate of the cost of improvement must precede the assessment and the assessment must precede the letting of the contract under secs. 6, 9, and 10 of ch. VII of the charter. No doubt this assessment must be corrected after the making of the contract in case the excess of benefits over damages should exceed the cost of the improvement. If the complaint could be read to mean that the assessment was not completed prior to the letting of the contract, this cause of action would be defectively stated, but a fair construction of the complaint in this respect leads to the conclusion that the pleader intended to charge that no assessment was made prior to letting the contract. This would be, to say the least, an irregularity avoiding the assessment and requiring a reassessment at which the plaintiff would have opportunity to be heard in respect to his damages and benefits. We think a cause of action is stated in this count, not necessarily for the damages itemized and claimed by the pleader, but for the regular measure of damages occasioned by a change of grade. If the plaintiff recovers for an unlawful taking of his private property, such damages cannot be duplicated under this count. If the vault or excavated area under the sidewalk was in the street, plaintiff cannot recover such damages as if it were his private property, but the vault is to be treated as any other convenience of a temporary character which he was rightfully enjoying and had the right to enjoy until such time as the city, representing the state in its paramount right to the use of the street, should by proper ordinance or resolution terminate his right of enjoyment. Such right is not terminated by an unlawful change of grade, and because of an unlawful change of grade he is entitled to damages caused thereby so far as his property with its lawful appurtenances is diminished in value by such change and

after due allowance for benefits. This states a good cause of action for a reassessment.

3. The third attempted cause of action rests upon a detailed statement of a contract between the city and one Vogel made on December 4, 1908, for the building of a bascule bridge across the Milwaukee river, and another contract between the city and another person made on November 26, 1909, for the building of a concrete tunnel under said river. Each of these contracts prescribed a time for completion of the work and a per diem penalty for delay. The contractors did not finish in time, but incumbered the street with tools, men, engines, sheds, wagons, and appliances for a long time, thus preventing plaintiff from using the street and the bridge and impairing or preventing access to his premises, etc., and the city did not enforce the penalty in the contract or compel the contractors to complete the work, but permitted the delay. From this it appears that the work contracted for was in pursuance of the public powers of the city and within its authority. The alleged damages were caused by the contractors, not by the city. There is no sufficient averment of negligence on the part of the city, and the omission to enforce the penalty of the contract or to compel the contractors to proceed is not actionable in the plaintiff's behalf. The city has a discretionary power in such matters. The averment of the complaint in this particular is: "that said department of public works has not compelled said contractors to complete their several contracts within the time specified in the said contract, thereby allowing the nuisance caused as above to continue for a longer time than was necessary; that the plaintiff suffered damages by reason of the breaches of the said contracts as hereinbefore set forth in an amount of not less than two thousand dollars ($2,000)."

This fails to state any cause of action in favor of the plaintiff and against the city. *Kuehn v. Milwaukee,* 92 Wis. 263, 65 N. W. 1030; *Sampson v. Boston,* 161 Mass.

288, 37 N. E. 177; *Harper v. Milwaukee,* 30 Wis. 365; *Erie v. Caulkins,* 85 Pa. St. 247.

There being two good causes of action in the complaint, the demurrers were properly overruled.

*By the Court.*—Order affirmed.

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PANOFF, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

*October 31—November 18, 1913.*

***Railroads: Injury to employee: Comparative negligence: Form of question in special verdict.***

1. Sec. 1816, Stats., does not require the finding of the jury upon the question of comparative negligence to be in any particular form of words: any finding which, in the light of the instructions given and the other findings, fairly shows that the jury definitely passed upon the matter, is sufficient. *Tidmarsh v. C., M. & St. P. R. Co.* 149 Wis. 590, explained.
2. Thus, where the jury specifically found actionable negligence of the railroad company proximately contributing to the injury, and also contributory negligence on the part of plaintiff, an affirmative answer to the question, "If you find that mutual fault of the defendant and plaintiff was the proximate cause of the injury, was the fault of the defendant greater?" was sufficient, where the jury were instructed that in answering that question they were "to determine whose fault was the greater contributing cause of the injury; the fault of the plaintiff or that of the defendant."

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

Action to recover compensation for a personal injury.

The action was commenced in the civil court of Milwaukee county. Plaintiff was injured in the course of his employment for defendant. He and others were engaged in assisting in unloading steel rails from a car to which an engine in charge of an engine crew was attached. By direction of the foreman, plaintiff held the end of a rope which was at-

tached to some rails on the car. While so circumstanced the engine crew suddenly, and without warning to plaintiff, started the engine, causing the rails to lurch in such a manner that the rope struck plaintiff, throwing him down upon rails which were on the ground, by reason of which he received a bodily injury. There was evidence making the question of whether the conductor of the train, containing the car which was being unloaded, exercised ordinary care in instructing plaintiff respecting the manner he should perform his work, and whether the engineer exercised ordinary care respecting the manner he started the engine. The jury found on both subjects in plaintiff's favor and that each element of negligence was a proximate cause of the injury. There was also a finding in defendant's favor as to contributory negligence of plaintiff, rendering the question of comparative negligence vital. That was submitted in this form: In the mutual fault, was that "of the defendant greater?" It was found in plaintiff's favor. Defendant's counsel requested submission of this: "Comparing the extent to which the defendant's servants' want of ordinary care contributed to the injury of *Panoff*, with the extent to which *Panoff's* want of ordinary care contributed to his injury, did defendant's servants contribute to a greater degree?" That was refused. The jury found the damages at $335. Judgment was rendered accordingly. The cause was appealed to the circuit court where the judgment of the civil court was reversed and a new trial ordered for failure to submit the question above quoted. Plaintiff appealed.

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *J. E. Tierney.*

For the respondent there was a brief by *C. H. Van Alstine, H. J. Killilea,* and *R. M. Trump,* and oral argument by *Mr. Trump.*

MARSHALL, J. This court did not intend to hold in *Tidmarsh v. C., M. & St. P. R. Co.* 149 Wis. 590, 136 N. W.

337, that the statute, in the particular terms thereof, in such a case as this, requires a finding as to whether the fault of the defendant was greater than that of plaintiff and contributed to produce the injury in the greater degree. The effect of the decision is that the jury should find the fact; but no particular collection of words was held to be requisite thereto. Any which, in the light of other findings and the instructions given by the court, fairly shows that the jury definitely passed upon the matter, is sufficient.

Here there was a specific finding of actionable negligence of the defendant proximately contributing to the injury, also a specific finding of want of ordinary care of the plaintiff so contributing, followed by a finding in plaintiff's favor of this: "If you find that mutual fault of the defendant and plaintiff was the proximate cause of the injury, was the fault of the defendant greater?" substantially following the suggestion in *Jensen v. Wis. Cent. R. Co.* 145 Wis. 326, 128 N. W. 982, and the minds of the jurors were directed to the precise point of inquiry by this instruction: "In answering this question you are to determine whose fault was the greater contributing cause of the injury; the fault of the plaintiff or that of the defendant." "You are to determine in answering this question whose fault was the greater contributing cause of plaintiff's injury." In the light thereof the jury could not well have otherwise found in answering the question than that want of ordinary care of the defendant contributed to produce the injury and in greater degree than like fault of the plaintiff. Had the learned circuit judge more fully appreciated the effect of the quoted instruction in connection with the question, he would have observed that the trial in the civil court would stand the test of *Tidmarsh v. C., M. & St. P. R. Co., supra.*

*By the Court.*—The judgment is reversed, and the cause remanded with directions to affirm the judgment of the civil court.

SOMMERFELD, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

*October 31—November 18, 1913.*

*Negligence: Railroads: Switching of cars: Contributory negligence: Evidence: Assumption of risk where relation of master and servant did not exist: Instructions to jury: Imputed negligence: Appeal: Presumption against error: Prejudicial errors.*

1. Plaintiff was engaged in moving cars, with the aid of horses, upon a switch track. While he was standing at the front end of a car, with one foot over the rail, attempting to loosen a brake shoe, other cars were switched by defendant against the rear of that car and he was run over and injured. The evidence, showing among other things that the day was bright, that the cars were being switched up grade, and that a fellow-servant at the rear of the car uttered a warning to another standing near, which plaintiff might have heard, is *held* to sustain a finding by the jury of contributory negligence.
2. In an action against a railway company for injuries sustained by an employee of a brewing company while moving cars upon a switch track in the yards of the brewing company, it was proper to receive in evidence the agreement between the brewing company and the railway company under which the switching was being done; and in any event it could not have prejudiced plaintiff, who was found guilty of contributory negligence.
3. Where the relation of master and servant did not exist between the parties to an action for personal injuries, an instruction upon the subject of assumption of risk, if error, cannot be regarded as prejudicial error, where there was no evidence tending to show that plaintiff assumed the risk which caused his injury.
4. Where there is other evidence in the case to support a finding of contributory negligence, it will not be presumed to have been based upon a point, such as assumption of risk, which had no support in the evidence.
5. Where plaintiff was injured by defendant's negligence in backing cars without any warning against the one at which he was working, and the evidence on both sides was to the effect that on former occasions warning had always been given, while defendant's evidence was also to the effect that warning was given at the time in question, there could not have been an assumption of that risk.

6. An instruction in such case to the effect that it was plaintiff's duty to exercise ordinary care to keep himself out of danger and to listen for signals that cars were approaching, was appropriate and substantially correct.
7. The doctrine of imputed negligence does not go to the extent of charging one employee with negligence because his fellow-servant was negligent.
8. Where the jury found plaintiff guilty of contributory negligence, but this court is unable to determine whether or not such finding was based upon the negligence of a fellow-servant, of which there was some evidence and which the court erroneously instructed the jury they might impute to the plaintiff, such error must be deemed prejudicial.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

On May 12, 1911, plaintiff was employed by the Schlitz Brewing Company, and in the performance of his duty was engaged in moving cars along one of the railroad tracks in the yards adjacent to said company's plant. Horses were used in moving the cars, the crew consisting of three men. On this occasion the horses could not start the car because the brake shoes were tight against the wheels. Plaintiff took a club which he used for the purpose and attempted to knock the brake shoes loose. While he was standing with one foot over the rail and one hand on the lower rung of the ladder of the car, the defendant railway company switched in other cars against the one upon which plaintiff was working, and he was run over and his right leg crushed so that amputation below the knee was necessary. This action was brought to recover damages for the injuries sustained. The complaint alleged negligence on the part of the defendant by reason of its failure to warn the plaintiff of the approach of the cars which were being switched in, by the ringing of the engine bell or the blowing of the whistle or some other signal. The complaint also alleged that the defendant company was the owner of the tracks in the yards of the Brewing Company upon which the cars were standing when the

accident occurred. The jury found that the defendant was negligent, and by its answer to the sixth question in the special verdict found the plaintiff guilty of contributory negligence, and in accordance with such finding judgment was entered in favor of the defendant dismissing the complaint, from which judgment plaintiff appeals.

The plaintiff filed separate exceptions to the following portions of the charge under the sixth question in the verdict:

1. "You may take into consideration also this instruction, that a person entering upon an employment in which he is engaged when injured, assumes all risk or danger of injury ordinarily incident to such service. That is, he is held to assume the ordinary risks of the employment upon which he enters so far as those risks are known to him or in so far as they could become known to a person of ordinary care; all such risks he assumes in the employment in which he is engaged."

2. "It was the duty of the plaintiff to exercise ordinary care to keep himself out of danger. It was his duty to listen for signals that cars were approaching. And if you believe from the evidence that he did not listen for signals that cars were approaching, and for that reason failed to hear what Nick Barth called out to Klubertanz, he was guilty of a want of ordinary care. And if you believe from all the credible evidence that he was guilty of a want of ordinary care, and that such want of ordinary care naturally and probably contributed to his injury, and that he, as a person of ordinary intelligence and prudence, ought to have seen under the attending circumstances that by failure to listen for signals he might receive injury of some kind to his person, you will answer the sixth question Yes. Otherwise you will answer the question No."

3. "You should also take into consideration all the evidence and surrounding facts and circumstances bearing upon the question as to whether the plaintiff's fellow-servants, those in his immediate car-moving crew, the other two men, or any of them, failed to exercise ordinary care or were neglectful of any duty which he or either of them owed to the

plaintiff at the time, for the plaintiff's safety, which proximately contributed to his injury. And if you so find, that they failed to exercise ordinary care with respect to his safety by giving notice or warning, then your answer to this question should be Yes. Because the plaintiff is chargeable with the neglect or failure to exercise ordinary care for his safety on the part of his fellow-servants; and their neglect, if you find there was any such neglect, or failure to exercise ordinary care on their part, which proximately contributed to his injury, it is imputed to him in the law."

*Harry M. Silber,* attorney, and *A. J. Schmitz,* of counsel, for the appellant.

For the respondent there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Van Alstine.*

BARNES, J. The appellant claims that he was entitled to judgment on the verdict or else to a new trial.

The first claim is based on the assumption that the court should hold as a matter of law that there was no evidence in the case which would warrant a finding of contributory negligence, the jury having negatived the claim that warning was given by defendant's employees. This contention must be overruled. There was ample ground for the jury to find that had the plaintiff made reasonable and intelligent use of his senses of hearing and sight he could have discovered the approach of the train. The day was bright. The cars were being switched up grade. Plaintiff was at the front end of the car that was struck. It is very probable that the switch engine and the cars attached thereto made sufficient noise to be heard a distance of two car lengths. If they did not, then the jury might well have found that plaintiff should have heard and heeded the warning given by the co-employee Barth to Klubertanz. These men were at the other end of the car.

The right to a new trial is asserted because of error in admitting in evidence the agreement between the defendant and the Schlitz Brewing Company in regard to the ownership of

tracks and switching operations in the Schlitz yard, and because of erroneous instructions having been given to the jury under the sixth question in the special verdict.

The injury was received by an employee of the Schlitz Brewing Company who was engaged in a switching operation, by reason of the alleged negligence of the employees of the defendant. It was proper to show the agreement under which switching operations were carried on. In any event we do not see how the plaintiff could have been prejudiced by the evidence. As a matter of fact, it is quite evident that the plaintiff was not injured by it. If it had any effect, it would not be in the direction of convicting the plaintiff of contributory negligence. It had no possible bearing on this issue.

The paragraph of the charge numbered 1 in the statement of facts was a substantially correct statement of the law, had the relation of master and servant existed. The appellant argues that the doctrine of assumed risk does not apply or extend to negligence cases where the relation of the parties is other than that of master and servant, and that therefore the instruction was erroneous. Conceding the rule to be as appellant claims, no prejudicial error was committed. There was no evidence in the case which showed or tended to show that plaintiff assumed the risk which caused his injury. The injury, according to the findings of the jury, was due to the fact that cars were backed against the one on which plaintiff was working, without any warning having been given of their approach. The evidence on plaintiff's part was to the effect that on former occasions warning had always been given. The defendant's evidence was to the same effect and also to the effect that warning was given on this occasion. The plaintiff could not assume a risk which he knew nothing about, and one to which he had never before been subjected, and one which he had no means of knowing that he would ever meet. We cannot assume that the jury would base its finding on a point which had no support in the evidence, when there were

other grounds upon which contributory negligence might be found under the evidence.

The paragraph of the charge numbered 2 in the statement of facts was a substantially correct statement of the law and was appropriate under the evidence, hence there was no error in giving it.

The paragraph numbered 3 of the charge as found in the statement of facts was erroneous. The doctrine of imputed negligence is of limited application. In this state it has been largely although not wholly confined to cases where persons riding behind horses were injured and where the negligence of the driver was a contributing cause to the injury. These cases, beginning with *Prideaux v. Mineral Point,* 43 Wis. 513, are numerous. The rule has not been applied to the relation of master and servant here, and we know of no good reason why it should be. It would be a very harsh doctrine to apply to such a relation, being the equivalent of saying that an employee was actually guilty of negligence himself because his fellow-servant was negligent. The contrary rule is in substance held in *Landry v. G. N. R. Co.* 152 Wis. 379, 140 N. W. 75.

The most serious question in the case is whether the error should be held prejudicial. No very satisfactory conclusion can be reached on this subject. The evidence that plaintiff's fellow-servants were negligent is rather slight. If they were, it was because Barth did not efficiently warn plaintiff that the train was approaching. The jury might find that he could and should have done so. It might well have found the contrary. The jury may have answered the sixth question as it did because it concluded that had plaintiff made reasonable use of his senses he could have seen and averted the danger. If this was the conclusion which the jury reached, the instruction did the plaintiff no harm, because the verdict would have been the same had the erroneous instruction not been given. On the contrary, if the jury thought that Barth was negligent

in failing to warn the plaintiff and imputed such negligence to the latter and returned the answer which it did on this ground, the instruction was prejudicial as a matter of course. Unfortunately we are unable to look into the minds of the jurors and satisfy ourselves on which basis the verdict was returned. A majority of the court is of the opinion that the error should be held prejudicial under the rule of *Adams v. Bucyrus Co., ante,* p. 70, 143 N. W. 1027, and cases there cited.

*By the Court.*—Judgment reversed and a new trial ordered.

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CAWKER and others, Executors, etc., Appellants, vs. TRIMMEL, Respondent.

*October 31—November 18, 1913.*

*Landlord and tenant: Lease construed: "Alterations:" Electric wiring: Waste: Injunction.*

1. A contract appended to a lease, whereby the lessor agreed to furnish to the lessee electric current for incandescent or arc lamps at certain rates during the term of the lease, "provided, however, that the total price paid . . . shall not be less than $200 during any one year," did not require the lessee to take electric current from the lessor for heating or power purposes.
2. A covenant on the part of a lessee to make no "alterations" in the demised premises has reference, as applied to a building, to changes therein of a substantial nature, and is not breached by the making of small apertures in the wall and floor to admit electric wires.
3. The making of small apertures for the admission of electric wires, no appreciable damage resulting therefrom, did not constitute waste at common law as between landlord and tenant.
4. If it could be shown that damage would result from such act, the landlord would have a remedy, regardless of the fact that the premises would not be altered.
5. *It may be* that under a clause prohibiting alterations a change which was in fact an alteration might be enjoined even though it resulted in no damage to the landlord.

6. If a provision in a lease to the effect that "if tenants desire telegraphic or telephonic connections, the lessors reserve the right to direct the electricians as to where and how the wires are to be introduced, and without such directions no boring or cutting for wires will be permitted," applies to electric wires other than telephone or telegraph wires, then the clear implication is that the tenant has the right to install them, but under the direction of the lessors.

TIMLIN, J., dissents.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

In April, 1910, plaintiffs leased the store known as 240–242 West Water street, in the Cawker building, together with some space in the basement, to the defendant for the term of ten years, to be used as a restaurant and saloon. The lease contained the following provisions upon which appellants rely on their appeal:

(1) "It is mutually agreed and understood that said lessee shall make no alterations in the said premises without the consent of the said lessors first had and obtained in writing, under penalty of forfeiture of this lease and damages."

(2) "Said lessors shall furnish at their expense the steam for the steam heating apparatus in said premises, and that the heating and electric light apparatus, water pipes and gas pipes in said building shall be under the control and management of said lessors."

(3) "That he [the lessee] will obey and observe the rules and regulations of said building attached hereto numbered from 1 to 14, and that the said rules and regulations shall be deemed a part of this lease."

Rule 12 so made a part of the lease reads as follows:

"If tenants desire telegraphic or telephonic connections, the lessors reserve the right to direct the electricians as to where and how the wires are to be introduced, and without such directions no boring or cutting for wires will be permitted."

Attached to this lease was an agreement in regard to lighting, which agreement was referred to in the lease. The agree-

ment is in the form of a proposition made by the plaintiffs to the defendant and accepted by him. It reads:

"We agree to furnish you at the premises known as 240–242 West Water street electric current for incandescent or arc lamps from 7 a. m. until 11 p. m. daily, except Sundays, and from dusk until 11 p. m. Sundays, for a term of ten years from July 1st, 1910; we to furnish the necessary lamps free of charge, all broken lamps to be paid for by you. It being agreed and understood that if for any reason, without fault or negligence on our part, we are unable to supply the current either by our inability to connect our wires or by the disconnection of same, or otherwise, we shall be liable only for the loss of the amount due under this agreement for the time during which the current shall not be furnished.

"We will furnish you the current at the rate of ten cents per one thousand watts and allow you a rebate of forty per cent., provided the same is paid on or before the 10th of the following month for the current consumed during the previous month; provided, however, that the total price paid for electric current shall not be less than two hundred dollars during any one year. We are to have access at all reasonable hours to inspect meters and to change the same, if necessary, and in default of payment of our bills we are hereby authorized to enter your premises and remove said meters and any other property belonging to the estate of E. Harrison Cawker and to stop the supply of electricity without notice."

It appeared that the owners of the building owned and operated an electric light plant therein for the purpose of furnishing light to tenants in the building. It also appeared that when this action was commenced the Milwaukee Electric Railway & Light Company had extended its wires about twenty feet into the basement of the building under the saloon which the defendant was operating under his lease. During the early part of the year 1913 the defendant installed an electric piano in his saloon and proposed to carry the wires of the Milwaukee Electric Railway & Light Company some distance further back into the basement and carry them through a half or three-quarter inch hole which he proposed to make in the floor

so as to connect with the piano. The reason assigned for not using the plaintiffs' electric current was that the piano was not adapted to the voltage of such current, while it was adapted to that of the current furnished by the other company. On March 5, 1913, the plaintiffs brought an action to enjoin defendant from connecting the wires of the Milwaukee Electric Railway & Light Company with his piano and secured a preliminary injunction restraining the defendant during the pendency of the action from installing or permitting to be installed any wires for the conveyance of electric current not under the control of the plaintiffs, or from making or permitting any alterations in said building without the consent of the plaintiffs first had and obtained in writing, or from boring or permitting to be bored any holes in the walls or floor of said building. The defendant on answer and affidavits moved to dissolve the injunction, and it was dissolved by an order of the court made May 17, 1913. Such order recited that it was made with the "condition that the defendant give reasonable notice to the plaintiffs of the time when he intends to install wires for the conveyance of electric current in the building leased by him of the plaintiffs that they may have an opportunity to supervise such installation, and the plaintiffs shall co-operate with the defendant to the end that such installation may be accomplished speedily and without delay."

Plaintiffs appeal from the order of dissolution.

For the appellants there was a brief by *Ogden & Landeck,* attorneys, and *Arthur H. Anderson,* of counsel, and oral argument by *L. M. Ogden.* They contended, *inter alia,* that an owner of property has the right to lease it upon such terms as he chooses, and to have the covenants of the lease kept inviolate, regardless of whether or not substantial damage would result from the violation. *Beckwith v. Howard,* 6 R. I. 1; *Kunemann v. Boisse,* 19 La. Ann. 26; 2 Taylor, Landl. & T. (8th ed.) § 691; *Peer v. Wadsworth,* 67 N. J. Eq. 191,

58 Atl. 379; *De Wilton v. Saxon,* 6 Ves. Jr. 106; *Leech v. Schweder,* L. R. 9 Ch. App. Cas. 463; *Dickinson v. Grand Junction C. Co.* 15 Beav. 260; *Stewart v. Winters,* 4 Sandf. Ch. 587; *Engle v. Thorn,* 3 Duer, 15; *Consolidated C. Co. v. Schmisseur,* 135 Ill. 371, 25 N. E. 795; *Star B. Co. v. Primas,* 163 Ill. 652, 45 N. E. 145; *Kirkpatrick v. Peshine,* 24 N. J. Eq. 206; *Anderson v. Rowland,* 18 Tex. Civ. App. 460, 44 S. W. 911.

For the respondent the cause was submitted on the brief of *Friedrich, Teall & Hackbarth.*

BARNES, J. Appellants do not claim that the common-law action for waste would lie or that any action would lie on the facts before the court, were it not for the express covenants of the lease. But they argue that they have the right to lease their property under such conditions as they see fit and they have the right to see that these conditions are fulfilled, no matter whether substantial damage results from their nonfulfilment or not. It may well be doubted whether a court of equity, which ordinarily grants its injunctive relief to prevent irreparable injury and damage, should or would use its remedy to protect purely technical or theoretical rights, but we will not discuss or decide the question because we do not think the proposed action of the defendant runs counter to the covenants of the lease, for the reason that what the defendant proposes to do is not an "alteration" in the leased premises.

Ordinarily the word "alteration" as applied to a building means a substantial change therein. It is expressly so held in *Comm. v. Hayden,* 211 Mass. 296, 97 N. E. 783, and this definition was adopted by this court in *Kresge v. Maryland C. Co.* 154 Wis. 627, 143 N. W. 668. It is substantially so held in *Bigelow v. Worcester,* 169 Mass. 390, 48 N. E. 1, where it is said that reshingling a building is not an alteration of it. The foregoing definition is not a hard-and-fast one in-

tended to apply to all situations, but we think it fairly applies to the one before us.

It was suggested on the oral argument, although no such contention is made in the appellants' brief, that under the agreements the defendant is bound to use the electric current generated by plaintiffs exclusively for all purposes. The contract does not so provide. It does not mention current that might be used for heating or power purposes. In fact it does not require the defendant to use any current, but he must pay a minimum of $200 a year whether he uses current to that amount or not. If he saw fit to use tallow candles instead of electricity for lighting, he might do so, but he would still have to pay $200 a year for electric current because he agreed to do so.

The real controversy arises over the covenant in the lease which prohibits the tenant from making alterations in the premises without the consent of the lessors. No claim is made that the connection which the defendant proposes to make will result in damage or injury to the building, and the showing made on the motion to dissolve pretty clearly showed that no substantial injury or damage would result.

The circuit judge decided that the proposed act of the defendant did not constitute an alteration of the premises and neither did it constitute waste, citing *Brock v. Dole,* 66 Wis. 142, 28 N. W. 334, and *Melms v. Pabst B. Co.* 104 Wis. 7, 79 N. W. 738. The first case arose between landlord and tenant and the second between life tenant and remainderman. In the first case it is said that any material change is waste, even though it enhances the value of the property. In the second it is substantially held that very material changes may be made by the life tenant, so long as the value of the property is not thereby depreciated. So we have a different rule applicable to the ordinary relation of landlord and tenant from that which applies to life tenant and remainderman.

We are not unmindful of the claim that an alteration in a leased building resulting in damage thereto would constitute waste at common law and would be enjoined by a court of equity, or of the argument that the word "alteration" in the lease must be given some effect, and that if it is held to mean change resulting in damage, it might as well have been omitted entirely. Some courts have held that an express covenant prohibiting alterations to be made refers to those changes which a tenant might otherwise make without the consent of the owner. *Kunemann v. Boisse,* 19 La. Ann. 26; *Engle v. Owen,* 3 Duer, 15; *Denechaud v. Trisconi,* 26 La. Ann. 402; *Webster v. Nosser,* 2 Daly (N. Y.) 186; *Whitwell v. Harris,* 106 Mass. 532. It may be conceded for the purposes of this case that the principle underlying the decisions in these cases is correct, although the reasoning on which it is based is by no means invulnerable. These courts must of necessity recognize the rule that there may be alterations which are material and those which are not, and in this latter class fall these changes which do not result in damage to the landlord, but which none the less are alterations. See note to *Abel v. Wuesten,* 24 Am. & Eng. Ann. Cas. 393. In all of the cases above cited it was practically conceded that the thing done constituted an alteration. In one of the cases the tenant proposed to put up an addition to the building, and in two of the others partitions were so put in as to make two rooms where there was but one before. The decisions only go to the point that where it is proposed to make an actual alteration in a building when the lease forbids alterations to be made, the courts will prevent the change although the landlord may not be able to show that he would be injured thereby. The cases do not pretend to change or enlarge the meaning of the word "alteration," but simply hold that actual alterations not harmful will be prevented under an express covenant in a lease prohibiting them. Here the thing proposed is so small and inconsequential that we do not think it could be said that it would consti-

tute an alteration. If it was shown that damage would result from the act, no doubt the plaintiffs would have a remedy regardless of the fact that the building or premises were not or would not be altered. If the thing proposed here constitutes an alteration in the building, then we do not see why attaching trade fixtures to the floors or walls, hanging pictures on the walls, placing lights at convenient places, and many other things which tenants customarily do and are expected to do, would not constitute alterations. When all is said, the tenant was leasing the premises for use and not simply to look at from a respectful distance.

There is no other provision in the lease which affects the question before us. If rule 12 has any application to anything other than the telegraph and telephone wires mentioned, then the clear implication is that the tenant has the right to install the wires, but under the direction of the plaintiffs. Such right is given the plaintiffs in the order appealed from. It seems so obvious that the second clause quoted from the lease in the statement of facts has no bearing on the question before us that we refrain from discussing it.

*By the Court.*—Order affirmed.

TIMLIN, J. (*dissenting*). I do not think this case was correctly decided. The facts of the case and the covenants relied upon to uphold the injunction are sufficiently set forth in the majority opinion.

The word "alteration" is one that can never acquire by judicial decision a fixed or definite meaning, because it connotes change from and is always relative to some former state or condition. As such former state or condition is capable of unlimited variety so must the alteration be. This word is subject to the usual interpretative influences of subject, context, associated words, and further liable to be affected in its meaning by the varying former conditions to which it relates. No doubt to create a legal liability the alterations should

bring about some material or substantial change in the former condition. The physical change may or may not be great. It is rather the degree of interference with the dominion of the owner which determines the materiality of the alteration. The defacement of a caryatid or a gargoyle, a change in the style of decorations, of esthetic value only, the closing up of a window which impairs the light and therefore usefulness, might either of them be a material alteration. We are not to determine the materiality of change from the diameter of the hole bored or that of the wire inserted, nor from the pecuniary harm done alone, for even alteration which is pecuniarily beneficial may be wrongful. In the instant case the building was wired for an electric service controlled by the lessors, and the covenant to make no alterations is found in an instrument with covenants that electric light apparatus shall be under the control and management of the lessors, and that if the lessee desires telegraphic or telephonic connections (*i. e.* the insertion of wires) the lessors reserve the right to direct the electrician as to where and how the wires shall be introduced, and without such directions no boring or cutting of wires will be permitted. The alteration here proposed consists in bringing into part of the building through holes bored for that purpose, without the direction and against the consent of the lessor, the wires of another electric light and power company over which the lessor has no control. This is introducing into part of the building an electric current of strength sufficient to be dangerous in case of defective insulation or accidental contact with other wires. Where these wires are placed the lessor cannot place his electric light wires. His domination is interfered with. He cannot direct and control the placing of telephone or telegraph wires as he could before, because he must avoid contact with these foreign wires. His insurance rates may or may not be affected. A meter must be installed and periodically read. The insulation and con-

tact of wires must be taken care of. This brings into the building other persons with other and it may be adverse interests. The control of the lessor over these things which it is stipulated he shall control is materially affected by this alteration, hence I consider it a material alteration.

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DUHNE, Respondent, vs. HATTENDORF, Appellant.

*October 31—November 18, 1913.*

*New trial: Error in charge as to damages.*

**The evidence in this case showing that plaintiff was entitled to substantial damages for breach of contract, the trial court properly granted a new trial after the jury—as they were told they might do by an erroneous charge of the court—returned a verdict for nominal damages only.**

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

*Lawrence A. Olwell,* for the appellant.

*Adolph Huebschmann,* for the respondent.

WINSLOW, C. J. In an action for damages for failure to deliver 2,300 tons of brewer's grains the court held that a valid contract was shown and that it had been breached, and submitted to the jury simply the question of damages. The jury found nominal damages only, as they were told they might do by the charge of the court. Upon motion for a new trial by the plaintiff, the trial judge on examining the evidence held that, under that part of the evidence most favorable to the defendant, the plaintiff was shown to have lost at least fifteen cents per ton on 300 tons, and hence he concluded that so much of the charge as stated to the jury that they might re-

turn a verdict for nominal damages was prejudicially erroneous, and he thereupon set aside the verdict and granted a new trial.

Examination of the evidence shows that the trial judge was right in his conclusion as to the state of the evidence and consequently was right in granting a new trial. Other questions are argued, but we have found no prejudicial error in any of the rulings of the trial court which are before us on this appeal.

*By the Court.*—Order affirmed.

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JAMES and wife, Respondents, vs. KNOX, Appellant.

*October 31—November 18, 1913.*

*Contracts: Exchange of lands: When time is of the essence.*

In an agreement for the exchange of lands the provision "that all necessary papers in the transfer of the properties from each to the other . . . shall be ready for delivery and be delivered from each to the other on or before the 1st day of March, 1912," clearly indicates an intention by both parties that the deal should be fully closed on or before the date specified; and in an action to cancel the agreement, upon evidence that an extension of time asked for by defendant was refused by plaintiff and that on March 1st plaintiff notified the person with whom the parties had agreed to deposit the deeds in escrow, and who had plaintiff's deed, that if defendant wished to close the deal plaintiff would be at his home until midnight for that purpose, the trial court properly *held* that time was of the essence of the contract and that a tender of performance by defendant after March 1st was not sufficient.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Suit in equity to cancel a written agreement and to remove a cloud upon title. On February 12, 1912, the plaintiff *Euclid W. James* and the defendant, for a legal consideration, entered into a written agreement wherein plaintiff agreed to convey to the defendant by good and sufficient warranty deed certain premises described therein, and the defendant likewise agreed to furnish full abstract of title and to convey to the plaintiff by good and sufficient warranty deed certain described premises and, in addition thereto, to pay to him $200 in cash. It was also mutually agreed "that all necessary papers in the transfer of the properties from each to the other . . . shall be ready for delivery and be delivered from each to the other on or before the 1st day of March, 1912." It was further agreed between the plaintiff and defendant that the deeds mentioned in their written agreement should be deposited with one Hugo Rohr. Plaintiff, accordingly, before March 1st, deposited the deed of his premises with said Rohr, who, on or about the 12th day of March, 1912, delivered it to the defendant, contrary to the instructions of plaintiff and without his consent or knowledge, and the same was recorded.

The plaintiffs charged the breach, and the defendant pleaded the performance, of the quoted part of their agreement hereinabove set forth, and of the whole thereof. The court found:

"That the plaintiffs on the 1st day of March, 1912, and at the time agreed upon in and by said articles of agreement, duly tendered to the defendant a good and sufficient deed and abstract of the premises so owned by the plaintiffs, and a satisfaction of the mortgage theretofore existing on the plaintiffs' said property as shown by the abstract, and kept and performed all the conditions of said agreement to be kept and performed by the plaintiffs, and demanded that the defendant execute and deliver to them a good and sufficient deed and abstract of the premises mentioned in said agree-

ment as owned by the defendant, together with the sum of $200, but the defendant refused to give to the plaintiffs such deed and abstract of the premises claimed to be owned by him, as in and by said agreement required, and has failed and neglected to keep and perform the conditions of said agreement to be kept and performed on his part, and the deed or deeds executed by the defendant, and the abstract tendered to the plaintiff did not show a good merchantable title to the premises claimed to be owned by the defendant, and the title to the defendant's premises was not a sufficient or merchantable title until about June 6, 1912."

As conclusions of law the court held the agreement, and deed to defendant, a cloud upon the title of *Georgiana James,* the grantee of the plaintiff *Euclid W. James,* to whom he conveyed the premises embraced in the deed to the defendant, and entered judgment establishing title in such grantee. From such judgment the defendant appealed.

For the appellant there was a brief by *John J. Maher,* and oral argument by *P. G. Lewis.*

For the respondents the cause was submitted on the brief of *Clarke & Donnelly.*

VINJE, J. The finding that the plaintiff *Euclid W. James* duly performed his part of the agreement within the time therein specified is supported by the evidence. Indeed, this assignment of error is not seriously argued in the brief, but it is insisted that the court erred in finding that the time fixed in the contract for its performance was of the essence thereof, and it is urged that a tender of performance by defendant on June 6, 1912, was seasonably made. The contract contained this provision:

"It is mutually agreed by and between the said parties of the first part and the said party of the second part that all necessary papers in the transfer of the properties from each to the other as hereinbefore specified shall be ready for delivery from each to the other on or before the 1st day of March, 1912."

These are plain words and clearly indicate an intention by both parties that the deal should be fully closed on or before the date specified. That both parties so understood it is also clearly manifest from the evidence of plaintiff *Euclid W. James* that on or about March 1st the defendant sought to have him sign a paper extending the time of performance of the agreement to March 11, 1912, which he refused to do. He further testified that on March 1st he notified Rohr, who held the deed in escrow, that if defendant wanted to close the deal he could come to his home at any time until midnight and he would be there to close the transaction. In view of the provisions of the agreement, and the evidence, the trial court properly held that time was of the essence of the contract. *Hall v. Delaplaine,* 5 Wis. 206; *Phillips v. Carver,* 99 Wis. 561, 75 N. W. 432. Cases holding that a failure to pay a given sum of money upon a date designated or that a failure to perform some other act within a specified time does not avoid the contract in the absence of any language therein or evidence showing that the time for such performance has been made material by agreement of the parties, rest upon a different basis.

*By the Court.*—Judgment affirmed.

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SCHACHT, Respondent, vs. ORIENTAL STORAGE & TRANSFER COMPANY, Appellant.

*November 1—November 18, 1913.*

***Evidence: Competency: Value of property: Cost: When owner may testify: Fixing value by court: Conversion of goods stored: Proof of ownership: Lien for storage charges: Enforcement: Common carriers.***

1. The owner of property, such as used household goods, which has no established market value is competent to testify to its

value, particularly where such owner purchased the greater part of the goods.

2. The testimony of the owner of such goods that in fixing values she took into account the cost price of the articles, making such deduction as she thought proper to cover depreciation, and that the values fixed by her were reasonable, was competent and tended to prove market value. *Allen v. C. & N. W. R. Co.* 145 Wis. 263, distinguished.
3. Where there is a wide discrepancy between the testimony of the witnesses for the respective parties as to the value of property, the court is not bound to accept the valuation of any witness but may find the value at some intermediate figure.
4. Where goods were left for storage with defendant by a constable who had taken them on a writ of replevin sued out by plaintiff, plaintiff's uncontradicted testimony, given without objection, that she had been awarded the goods in the replevin action and had promptly notified defendant of that fact, was sufficient proof of her ownership to justify a recovery by her for conversion of the goods by defendant.
5. The fact that a storage company is also engaged in the draying business does not make it a common carrier as to that part of its business which consists of storing goods for hire, or entitle it to enforce a lien for storage charges by proceedings under ch. 391, Laws of 1903 (secs. 1646—1 to 1646—3, Stats.); but it must proceed under sec. 3347, Stats.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action for conversion brought to recover the value of two lots of goods consisting of household furniture which plaintiff claimed to own and which were left with the defendant for storage. The first lot was stored in 1908 and the second in 1909. The goods were sold by defendant in March, 1911, to pay storage charges, the first lot being sold for $61 and the second for $18.25. In making the sale the defendant proceeded under ch. 391 of the Laws of 1903. Damages were claimed in the complaint for $1,500. The case was tried in the civil court, a jury being waived. The court assessed the plaintiff's damages at $450, and from a judgment in plaintiff's favor defendant appealed to the cir-

cuit court, where the judgment of the civil court was affirmed. From such judgment this appeal is taken.

For the appellant there was a brief by *Curtis & Mock,* and oral argument by *H. K. Curtis.*

For the respondent there was a brief by *Rubin & Zabel,* attorneys, and *W. B. Rubin* and *A. W. Foster,* of counsel, and oral argument by *Mr. Foster* and *Mr. H. B. Walmsley.*

BARNES, J. The appellant insists that the judgment should be reversed (1) because there was no competent evidence to show that the value of the goods exceeded $100; (2) because the second lot of goods was stored by one O'Malley, and plaintiff had no right to recover therefor; and (3) because the defendant was a common carrier and as such had the right to proceed to sell the goods for unpaid storage charges in the manner in which it did.

1. On the first ground of error it is insisted (a) that plaintiff was incompetent to testify to the value of the goods; (b) that, if she was competent, she adopted an improper basis for determining value; and (c) that in any event there was no evidence which would warrant a recovery of $450.

(a) The owner of property of this class which has no established market value is competent to testify to its value, particularly where, as in this case, such owner purchased at least the greater part of the goods. *Palmer v. Goldberg,* 128 Wis. 103, 107 N. W. 478; *Farley v. Spring Garden Ins. Co.* 148 Wis. 622 (134 N. W. 1054) and cases cited at p. 627; *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, 264, 136 N. W. 794.

(b) The plaintiff testified in substance that in fixing her values she took into account the cost price of the various articles and made such deduction as she thought proper to cover depreciation. She further testified that the prices fixed by her were reasonable. The appellant argues that the

reasonable market value of the goods at the time of the conversion could not be fixed in this way, the real issue being, what were the goods reasonably worth, assuming that there was a purchaser who desired to buy but who was not obliged to do so, and an owner who desired but was not obliged to sell. It is obvious that cost and reasonable market value are not synonymous. It is just as obvious that there is no established market value for goods of this class. Their value is affected by age, by the usage which the articles have had, by the present market value of new articles of like character, and by other considerations. While cost does not determine value, it is often a very important factor in arriving at it. In many cases it is one of the elements to be considered in fixing value, and this is particularly true of articles that have no established market value. So it has been held in a variety of cases that, while cost does not fix value, it is evidence of it and may in some instances be quite convincing evidence. *St. Louis & S. F. R. Co. v. Smith,* 42 Ark. 265; *Southern R. Co. v. Williams,* 113 Ga. 335, 38 S. E. 744; *Terre Haute & I. R. Co. v. Smith,* 65 Ill. App. 101; *Swanson v. K. & W. R. Co.* 116 Iowa, 304, 89 N. W. 1088; *Richmond v. D. & S. C. R. Co.* 40 Iowa, 264; *West Chester & W. P. R. Co. v. Chester Co.* 182 Pa. St. 40, 37 Atl. 905; *Kennebec W. Dist. v. Waterville,* 97 Me. 185, 54 Atl. 6; *Rawson v. Prior,* 57 Vt. 612; *Carr v. Moore,* 41 N. H. 131; *Schall v. Northland M. C. Co.* (Minn.) 143 N. W. 357, and cases cited. In *Glaser v. Home Ins. Co.* 47 Misc. 89, 93 N. Y. Supp. 524, it is said that evidence of the cost price of articles destroyed by fire has been frequently held to be proper and that often it is the only evidence available. And evidence of cost is more readily received when other evidence of value is not forthcoming. *State v. Sattley,* 131 Mo. 464, 33 S. W. 41. We think here that the plaintiff's evidence was competent on the question of value, not conclusive to be sure, but still pertinent to the issue and entitled to some con-

sideration. Appellant's counsel seem to think that the contrary is held in *Allen v. C. & N. W. R. Co.* 145 Wis. 263, 129 N. W. 1094. This is a mistake. There the only evidence of value was what certain machinery and sawmill fixtures had cost four years before. In the meantime most of the articles had been through a fire. The cost of the articles was $2,478, and the jury awarded $2,000 damages. It was held that the allowance was excessive and that the jury had no facts before them upon which a satisfactory estimate of value could be based. It is very apparent that there was little relation between cost and market value under these circumstances. In the case under consideration the plaintiff, using cost as a starting point, made what she considered a reasonable deduction for depreciation. At least such is her testimony. It was directed to and tended to prove market value when the conversion took place. The evidence of dealers in second-hand junk who testified for the defendant and who had casually looked at the goods with a view of bidding on them as a job lot is not very persuasive, as it was largely based on what they were willing to bid at the sale. The highest value placed by these witnesses did not exceed $100. The goods were actually sold for about $78.25.

(c) Appellant's counsel seem to think that it was incumbent on the court to find the value of the goods as testified to by some witness, and that an intermediate figure between the value testified to by plaintiff and the highest figure named by any witness for defendant could not be adopted. This is not so. *Whorton v. Webster,* 61 Wis. 219, 20 N. W. 907. The court might well believe that the plaintiff was altogether too partial to herself in fixing values, particularly inasmuch as she had sworn in a divorce proceeding that their value did not exceed $250. It might be said about this, however, that the exact value of the goods was not very important in that action and that it does not appear that the sworn statement was the result of any careful computation

or was in fact anything more than an estimate. The court might also be well satisfied that the junk dealers were not suffering from heart enlargement when they made their estimates of value. On the whole testimony on this subject of value, which was not very satisfactory on either side, we think the court made a fair assessment.

2. The evidence was sufficient to justify a recovery for the second lot of goods stored in 1909. The goods were left with defendant by a constable who had taken possession of them on a writ of replevin sued out by the plaintiff. She testified that she was awarded the goods and that she promptly notified the defendant of such fact. No objection was taken to the competency of this evidence, and it stands uncontradicted that the plaintiff was the owner of and entitled to the possession of the goods.

3. The appellant did not take the proper steps to enforce its lien for storage charges. It proceeded under ch. 391, Laws of 1903 (secs. 1646—1, 1646—2, 1646—3, Stats.), which provides a summary method of disposing of unclaimed personal property in certain cases. This act was before this court in *Devlin v. Wis. S. Co.* 147 Wis. 518, 133 N. W. 578, and it was there held that it applied only to such warehousemen as were common carriers, and did not apply to the business of storage for hire. The two cases are identical as far as the matter of remedy is involved. It is argued that the defendant is engaged in the draying business and that it is therefore a common carrier. As to that part of its business which consists of storing goods for hire, it is held in the *Devlin Case* that it is not a common carrier. Sec. 3347, Stats., defines the rights and provides for the remedies of a warehouseman for hire in case of failure to pay storage.

*By the Court.*—Judgment affirmed.

BANASZEK, by guardian *ad litem,* Respondent, vs. F. MAYER BOOT & SHOE COMPANY, Appellant.

*November 1—November 18, 1913.*

***Master and servant: Unguarded machinery: Special verdict: Instructions to jury: New trial: Misconduct of jurors: Consulting dictionary: Discretion: Appeal.***

**1. With reference to a question in the special verdict in an action for injuries to a servant, as to whether the rollers on a machine were securely guarded, the court instructed the jury that they should answer the question "No" if they found that the rollers were not securely guarded "and the plaintiff's negligence did not proximately contribute to the injury." *Held,* that it was error to add the clause above quoted.**

**2. Jurors having, during their deliberations, obtained a dictionary and read therein a definition of the word "proximate" at variance with the definition correctly given by the trial court, an order granting a new trial because of such irregularity is *held* not manifestly wrong, and is affirmed, although eleven of the jurors (the other not being found) made affidavits that the verdict was not influenced by the use of the dictionary.**

**[3. Whether such affidavits of the jurors were properly received in evidence to support the verdict, not determined.]**

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Plaintiff received an injury September 1, 1911, to his hand while feeding leather soles through large rolls in a machine in defendant's shoe factory. At the close of the trial the jury returned the following verdict:

"(1) Were the revolving appliances on the machine at which the plaintiff was at work at the time he was injured securely guarded? *A.* No.

"(2) If you answer the first question 'No,' then answer: Was the fact that the revolving appliances were not securely guarded the proximate cause of the plaintiff's injury? *A.* Yes.

"(3) Was the breaking of the iron guard referred to in the testimony caused by the wedging in the slot of said guard

of a bunch of soles, placed one upon the other and overlapping at the ends? *A.* Yes.

"(4) If you answer the third question 'Yes,' was the bunch of soles, one upon the other and overlapping at the ends, inserted in the slot of said guard by the plaintiff? *A.* Yes.

"(5) Was the plaintiff guilty of any want of ordinary care which proximately contributed to his injury? *A.* Yes.

"(6) What sum will reasonably compensate the plaintiff for the injury he sustained? *A.* $3,000."

A week or more after the jury rendered its verdict it came to the attention of the judge that while the jury were deliberating on their verdict a juror was permitted by the bailiff in charge of the jury to leave the jury room and go to the judge's chamber and there consult the Standard Dictionary as to the definition of the word *proximate.* Later he was permitted to bring the dictionary into the jury room. The court advised the parties of the irregularity and heard arguments upon it. At the hearing the affidavits of eleven jurors were read to the effect that the verdict was not influenced by the use of the dictionary; that a dispute had arisen between certain jurors as to whether the definition of the term "proximate cause" as given by the court was the same as that usually found in dictionaries, and that solely for the purpose of settling such dispute the dictionary was resorted to; and that the definition of the term "proximate cause" as given by the court controlled the jurors in reaching their verdict. The twelfth juror could not be found. The trial court set aside the verdict and granted a new trial on the ground that the evidence preponderated in favor of the contention that the misconduct of the jurors constituted a substantial error and affected the substantial rights of the plaintiff. The defendant appealed.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

VINJE, J. In instructing the jury upon the first question the court said: "If you believe that the rollers were securely guarded you will answer this question 'Yes.' If, on the other hand, you find that the rollers were not securely guarded *and the plaintiff's negligence did not proximately contribute to the injury, then you must answer this question 'No.'*" It was error to add the latter clause with reference to plaintiff's contributory negligence, for, manifestly, an unguarded condition, or an insecure guarding, of a machine, and contributory negligence on the part of the operator thereof, may co-exist.

By a reference to the verdict rendered the only question whose answer could have been affected prejudicially to plaintiff by consulting the dictionary was the fifth. The first question was answered favorably to him, so he is in no position to claim prejudicial error as to that. The same is true of the second question. In none of the other questions, or instructions relating thereto, was the word "proximate" used, so the irregularity could not have affected the answers to those.

For the purpose of this case we will assume, though we do not decide, that the affidavits of the jurors were properly received in evidence to sustain the verdict when challenged by the specified irregularity. Notwithstanding they all unite in affirming that the verdict was not influenced by the use of the dictionary, the trial court came to a contrary conclusion. He personally observed the jurors during the trial and was in a better position than this court can possibly be to judge of the effect upon them of reading a definition in a dictionary of acknowledged authority at variance with that

given by the court, for the definition in the Standard Dictionary omits the element of reasonable anticipation of injury contained in that correctly given by the trial court. In view of this fact and of the rule that this court will not disturb an order of a trial court granting a new trial unless manifestly wrong, we conclude that the order must be affirmed.

Defendant urges that, in view of the answers given by the jury to questions 3 and 4, this court should say as a matter of law that plaintiff was guilty of contributory negligence. We are unable to reach that conclusion, and, as there must be a new trial, we forbear to discuss the question lest we might thereby foreclose the trial court and jury from giving an unbiased decision thereon under the evidence as it may then appear.

*By the Court.*—Order affirmed.

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RAETHER, Administratrix, Appellant, vs. FILER & STOWELL MANUFACTURING COMPANY, Respondent.
SAME, Respondent, vs. SAME, Appellant.

*November 1—November 18, 1913.*

*Appealable orders: New trial: Discretion: Affirmance.*

1. That part of an order granting a new trial which refuses to change the answers to questions of the special verdict and denies defendant's motion for judgment is not appealable, standing by itself.
2. A motion to modify a previous order granting a new trial is not a special proceeding, and the order denying such motion is not appealable.
3. An order granting a new trial, made in the exercise of the trial court's discretion, will be affirmed unless an abuse of discretion appears.

APPEALS from orders of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *One order affirmed, on plaintiff's appeal; defendant's appeals dismissed.*

This is an action to recover damages for the death of Edward Raether, the plaintiff's intestate and an employee of the defendant company, who was killed February 8, 1907, while engaged in switching in the railroad yard maintained by defendant in connection with its factory in Milwaukee. It was claimed that the defendant was negligent in various ways, the most important of which were negligence in employing one Schultz as superintendent of the yards and in not furnishing a safe place to work. The action has been tried twice. On the first trial, before Judge LUDWIG in May, 1910, a special verdict favorable to the plaintiff was rendered, but the same was set aside because in the opinion of the trial judge the testimony of Schultz was incredible and untrue, and findings based on such evidence ought not to be permitted to stand. A second trial was had before Judge TURNER and a jury, and the following special verdict rendered:

"(1) What was the open space between the platform of the derrick car at the point where the stirrup step upon which the deceased stood, was attached, and the east side of the gondola car at the north end thereof, when the derrick car passed the gondola? State it in inches. *A.* Sixteen inches.

"(2) Was the open space between said derrick car and the gondola at the place indicated in question 1 so narrow that a person who was exercising ordinary care, when riding on the derrick car, standing on said stirrup step, was liable to come in contact with the gondola when the derrick car passed it? *A.* Yes.

"(3) Was the deceased directed by the general foreman, Thomas O'Neill, previous to the accident, to stand on the derrick car platform or the engine steps, but not to stand upon a stirrup step when engaged in such work as Raether was doing at the time of the accident, while the derrick car was moving? *A.* No.

"(4) Was Raether, before the accident, directed by Schultz, the yard foreman, to stand on the stirrup step on the west side of the derrick car while the same was moving and to fix his attention on the hook or any part of the apparatus for carrying ashes? *A.* Yes.

"(5) If you answer question 2 'Yes,' then answer: Did the defendant fail to exercise ordinary care by so placing said gondola car on track 6 at the place where it was standing at the time of the accident? *A.* Yes.

"(6) If you answer question 5 'Yes,' then answer: Was such failure to exercise such care a proximate cause of the injury to Raether? *A.* Yes.

"(7) Was the foreman, Schultz, incompetent to perform his duties prior to the accident because of habitual intoxication? *A.* Yes.

"(8) If you answer question 7 'Yes,' then answer: Did the defendant know before the accident that Schultz was incompetent to perform the duties with which he was charged? *A.* Yes.

"(9) If you answer question 7 'Yes' and question 8 'No,' then answer: Ought the defendant in the exercise of ordinary care to have known before the accident that Schultz was incompetent to perform the duties with which he was charged? *A.* (No answer.)

"(10) If you answer question 7 'Yes,' then answer: Was such incompetency the proximate cause of the injury to the plaintiff? *A.* Yes.

"(11) Ought Raether in the exercise of ordinary care to have reasonably apprehended that while riding on the step of the derrick car when passing the gondola that he was liable to come in contact with said gondola? *A.* No.

"(12) Was the danger to a person riding on the stirrup step of the derrick car, of being struck by the gondola car, under the circumstances surrounding the accident, open and obvious to a person of full age, ordinary intelligence and the experience had by Mr. Raether, and who was in the exercise of ordinary care? *A.* No.

"(13) Did any want of ordinary care on the part of the deceased, Raether, proximately contribute to produce the injury? *A.* No.

"(14) What sum of money will reasonably compensate

the plaintiff for her pecuniary loss sustained by the death of her husband, Edward L. Raether? *A.* $3,971.50."

This latter verdict differed in several important respects from the first verdict. The plaintiff moved for judgment on the verdict. The defendant moved for judgment *non obstante,* and in case of denial of that motion then to reverse the answer to the third, fourth, seventh, eighth, tenth, eleventh, twelfth, and thirteenth questions, and to strike out the answer to the sixth question, and for judgment on the amended verdict; and in case of denial of that motion to set aside the whole verdict and grant a new trial. The court denied the plaintiff's motion for judgment, granted the defendant's motion to change the answers to questions 4, 7, 8, and 10 from "Yes" to "No," but refused to change the answers to any other questions, denied the defendant's motions for judgment, and granted a new trial upon payment of $25 attorney's fees and the taxed disbursements of the trial. The circuit judge filed an opinion when he decided this motion, in which he said, among other things:

"Having the confessed testimony of Schultz that he perjured himself before the coroner, and the numerous material contradictions in his evidence, and being of the opinion that his testimony necessarily exercised great influence over the jury in causing them to arrive at the verdict that they did, and recognizing the fact that the juries have not coincided in their answers to the questions of the special verdict, and being of opinion that a verdict based upon or influenced by the testimony of Schultz, a confessed perjurer, ought not to stand, it is the decision of the court that the motion of the defendant for a new trial is granted, upon the payment of $25 attorney's fees and the taxed disbursements of the trial."

The plaintiff seasonably appealed from the whole of this order. The defendant appealed from those parts of said order which refused to change the answers and refused to direct judgment for the defendant. Before expiration of the time for appealing from this order the defendant also moved

to modify the same *nunc pro tunc,* so that it should reverse the answers to the eleventh, twelfth, and thirteenth questions and should grant judgment for the defendant dismissing the complaint. Several months later and after the time for appealing from the first order had expired, an order was made denying the second motion and directing that the order for a new trial stand. From this last named order the defendant took an appeal. The plaintiff moves to dismiss both of defendant's appeals.

For the plaintiff there was a brief signed by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

For the defendant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

WINSLOW, C. J. In this case it is held:

First, that part of the order granting a new trial which refuses to change the answers to the questions of the special verdict and denies defendant's motion for judgment is not appealable, standing by itself. The statute (sec. 3069) only authorizes an appeal from an order granting a new trial, and unless that part of the order be appealed from the statute gives this court no right to review the remaining part of the order.

Second, the statute does not authorize an appeal from an order refusing to modify a previous order granting a new trial. Such a motion is not a special proceeding in any sense.

Third, it being evident that the trial court granted the new trial in the exercise of his discretion, because he was not satisfied with the verdict, and it being also evident that there was no abuse of discretion, the order granting a new trial must be affirmed.

*By the Court.*—The defendant's appeals are dismissed, and upon the plaintiff's appeal the order granting a new trial is affirmed.

ÆTNA ACCIDENT & LIABILITY COMPANY, Appellant, vs. LYMAN, Respondent.

*October 28—December 9, 1913.*

***Appeal and error: Constitutional law: What courts may issue writs of error.***

1. **A writ of error from the circuit court for Milwaukee county will not lie to review a judgment of the civil court of said county.**
2. **Sec. 21, art. I, Const., providing that "writs of error shall never be prohibited by law," was intended merely to preserve the right to issue the writ as it existed in the territory of Wisconsin when the constitution was adopted, and hence continues such right in the supreme court only.**
3. **Neither the grant of appellate jurisdiction to the circuit courts nor the grant of power to issue certain specified writs "and all other writs necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions" (sec. 8, art. VII, Const.), confers the right to issue a writ of error.**

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

The plaintiff in error petitioned the circuit court for Milwaukee county for a writ of error. The petition showed that on the 18th day of December, 1911, a judgment was entered in the civil court of Milwaukee county in the city of Milwaukee against the petitioner in an action in which *Thomas T. Lyman* was plaintiff and the petitioner herein defendant, in which it was adjudged that the plaintiff recover of the petitioner $366.85 damages and $22.23 costs; that the judgment was rendered in an action at law; that the court in which said judgment was rendered committed error to the prejudice of the petitioner, setting forth the error and praying that a writ of error might issue to the civil court of Milwaukee county for the correction of the errors complained of. A writ of error was issued accordingly, and afterwards on motion of

the defendant in error the writ was dismissed. The court made the following order:

"It is ordered that the writ of error heretofore issued out of this court and now pending, sued out by the *Ætna Accident & Liability Company,* plaintiff in error, on the 18th day of October, 1912, against the defendant above named, *Thomas T. Lyman,* for the purpose of reviewing a judgment of the civil court of Milwaukee county rendered in an action wherein said *Thomas T. Lyman* was plaintiff and *Ætna Accident & Liability Company* was defendant, be and the same hereby is dismissed for want of jurisdiction to issue a writ of error to the civil court of Milwaukee county; and that the defendant in error have $10, the costs of this motion."

The plaintiff in error appealed from this order.

For the appellant there were briefs by *Quarles, Spence & Quarles,* attorneys, and *Irving A. Fish,* of counsel, and oral argument by *Mr. Fish.*

For the respondent there was a brief by *Lenicheck, Robinson, Fairchild & Boesel,* and oral argument by *Nathaniel W. Robinson.*

KERWIN, J. Conceding that the civil court of Milwaukee county is a court of record with general limited jurisdiction, we approach the main question here, namely, whether a writ of error from the circuit court for Milwaukee county will lie to review a judgment of the civil court.

While the civil court within its jurisdiction proceeds according to the course of the common law and a jury trial may be had therein, a new trial may be awarded in the circuit court on appeal from the civil court in a proper case. The civil court is inferior to the circuit court and its proceedings may be reviewed in the circuit court on appeal. Ch. 549, Laws of 1909; *Eder v. Grifka,* 149 Wis. 606, 136 N. W. 154; *Milwaukee v. Simons,* 93 Wis. 576, 67 N. W. 922.

It is contended by appellant that the judgments of the civil court in actions at law are such as were under the territorial

organization reviewed by writ of error, and therefore it is argued that under our constitution and statutes a writ of error will lie from the circuit court for Milwaukee county to the civil court of said county, the circuit court being the only court which has appellate jurisdiction over the civil court.

The argument of counsel for appellant is able and ingenious, and doubtless is as strong a showing as can be made in support of their position. We are however of opinion that the contention cannot be sustained. We are cited by appellant to some authorities in England showing the condition of the law there before the organization of our territory. But we are not bound by the law of England except in so far as we have adopted it as a part of our judicial system. Sec. 13, art. XIV, Const.; *Webster v. Morris,* 66 Wis. 366, 28 N. W. 353.

Sec. 21, art. I, of the constitution of Wisconsin provides that "writs of error shall never be prohibited by law." This provision manifestly was intended to preserve the right to issue the writ as it existed in the territory of Wisconsin when the constitution was adopted. *Jackson v. State,* 92 Wis. 422, 66 N. W. 393; *Crocker v. State,* 60 Wis. 553, 19 N. W. 435; *Bumbalek v. Peehl,* 95 Wis. 127, 70 N. W. 71; *Buttrick v. Roy,* 72 Wis. 164, 39 N. W. 345. In *Jackson v. State, supra,* this court said:

"By the organic law of the territory at the time of the adoption of the state constitution, a writ of error was allowed only from final judgments or orders in the nature of final judgments; and this right was preserved and secured by art. I, sec. 21, of the constitution, which provides as follows: 'Writs of error shall never be prohibited by law.' As said by Mr. Justice LYON in *Buttrick v. Roy,* 72 Wis. 164, 39 N. W. 345, in effect, this constitutional provision renders the writ inviolate, as it existed when the constitution was adopted. . . . Such is the measure of the constitutional right to the writ, and sec. 3043 is merely declaratory of the constitutional right, neither extending nor attempting to restrict it."

And in *Bumbalek v. Peehl, supra,* it is said:

"While our constitution prevents the legislature from prohibiting writs of error, yet that provision did not enlarge the scope of the writ as it existed when the constitution was adopted, nor prevent the legislature from making reasonable regulations in respect to its use."

See, also, *Gaston v. Babcock,* 6 Wis. 503; *Stilwell v. Kellogg,* 14 Wis. 461; *Connecticut Mut. L. Ins. Co. v. Cross,* 18 Wis. 109; *Mead v. Walker,* 17 Wis. 189; *Lombard v. Cowham,* 34 Wis. 300; *O'Donnell v. State,* 126 Wis. 599, 106 N. W. 18.

In view of the foregoing adjudications in this state it is necessary to consider what the law was on the subject at the time the constitution of this state was adopted in order to determine what writs of error "shall never be prohibited by law."

The organic law of Wisconsin, passed in 1836, provides that the judicial power of the territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace; that the supreme court shall consist of a chief justice and two associate judges; that the district courts shall be held in each of the three districts by one of the judges of the supreme court, at such times and places as may be prescribed by law; that the jurisdiction of the several courts shall be as limited by law. Sec. 9. This section further provides that the supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction, and "writs of error, bills of exception, and appeals in chancery causes shall be allowed in all cases from the final decisions of the said district courts to the supreme court, under such regulations as may be prescribed by law." It will be seen that the organic law provides for writs of error from the supreme court to the district court of the territory only, unless the legislature of the territory provides otherwise.

Territorial Laws of 1839, sec. 1, p. 196, fixes the jurisdiction of the supreme court of the territory, and provides that "the supreme court of the territory shall have and exercise an appellate jurisdiction only, which shall extend to all matters of appeal, error or complaint from the decisions, judgments or decrees of any of the district courts in all matters of law or equity. . . ."

Sec. 2 provides:

"The supreme court shall have power to issue writs of *mandamus, quo warranto,* prohibition, error, *supersedeas, procedendo, certiorari, scire facias,* and all other writs and process not specially provided for by statute, which may be necessary to enforce the due administration of right and justice throughout the territory."

Sec. 6 prescribes the jurisdiction of the district court and provides:

"The district courts shall have original jurisdiction within their respective districts in all civil actions at law or in equity, and appellate jurisdiction in all cases in their several districts from the probate courts, and the decisions of justices of the peace, and the judges of said courts shall be conservators of the peace; and the said courts in term time, and the judges thereof in vacation, shall have power to award throughout the territory, returnable in the proper county, writs of injunction, *ne exeat,* and all other writs and process which may be necessary to the due execution of the powers with which they are vested; and the said courts shall respectively have power and authority to hear and determine all cases of crimes and misdemeanors of whatever kind, not cognizable by a justice of the peace, which may be committed within any county or place within their respective districts."

So it will be seen that no power is conferred upon the district courts to issue writs of error, such writs not being "necessary" to the "due execution of the powers with which they are vested."

The supreme court and circuit courts established by the

constitution correspond to the supreme and district courts in territorial times in so far as the question of the right to issue the writ of error is concerned, therefore sec. 21, art. I, of the state constitution, which provides that writs of error shall never be prohibited by law, continues the right to issue the writ in the supreme court only. At the time of the adoption of the constitution the judicial method by which the supreme court reviewed judgments in actions at law was by writ of error, and the only method by which the district court reviewed judgments of inferior courts was by appeal. So it seems plain that the framers of the constitution referred by sec. 21, art. I, to writs issued from the supreme court.

Counsel for appellant contends that, appellate power being conferred by the constitution on circuit courts, they have by virtue of such power authority to issue writs of error, and insists that sec. 8, art. VII, includes the power to issue writs of error, and relies upon *Milwaukee v. Simons,* 93 Wis. 576, 67 N. W. 922, where it is said that "where the appellate jurisdiction is so vested the judgment may be reviewed on writ of error," and *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 515, where the court said: " The framers of the constitution appear to have well understood that, with appellate jurisdiction, the court took all common-law writs applicable to it." It will be observed, however, that in these cases the court was considering the appellate jurisdiction of the supreme court.

It is quite significant that the constitution does not in express terms grant power to the circuit court to issue a writ of error. Sec. 8, art. VII, provides:

"The circuit courts shall have original jurisdiction in all matters civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law; and appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. They shall also have the power to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari,* and all other writs necessary to carry into effect their orders, judgments and de-

crees, and give them a general control over inferior courts and jurisdictions."

The writ of error is not mentioned in the grant of power to the circuit courts, while other common-law writs are. "All other writs necessary to carry into effect their orders, judgments and decrees," obviously does not include writs of error. The grant of appellate jurisdiction to the circuit courts does not of itself grant the right to issue a writ of error. *State ex rel. Milwaukee Med. College v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *State ex rel. Tewalt v. Pollard,* 112 Wis. 232, 87 N. W. 1107; *State ex rel. McGovern v. Williams,* 136 Wis. 1, 116 N. W. 225.

In Michigan, under constitutional provisions similar to ours on the subject, it has been held that circuit courts cannot issue writs of error to inferior courts. Const. Mich. art. VI; Compiled Laws Mich. 1897, p. 226; *Swift v. Wayne Circuit Judges,* 64 Mich. 479, 31 N. W. 434.

In *Teller v. Wetherell,* 6 Mich. 46, at page 48 the court said: "As to the jurisdiction of the circuit court. The constitution and statutes defining and limiting its jurisdiction do not give it power in any case to issue a writ of error, and without this power a writ of error *coram vobis,* issued by that court, would be void. 20 Johns. 22; 14 id. 422."

Counsel for appellant also cites us to the practice in New York at the time of the adoption of our constitution to the effect that writs of error were issued by the supreme court of New York to inferior courts. But, as pointed out by the learned counsel for respondent in their brief, the supreme court of New York is what was formerly the supreme court of the colony of New York, and the first constitution of New York, adopted in 1777, did not prescribe the powers of the supreme court but recognized it with its colonial powers. *Kanouse v. Martin,* 3 Sandf. 653; Const. N. Y. 1777, secs. 35, 41; Const. N. Y. 1822, art. V, sec. 4; Const. N. Y. 1846, art. VI, sec. 7.

Counsel for appellant says that in *Second Ward Bank v. Upman,* 14 Wis. 596, the right of the circuit court to use the writ of error in a proper case was conceded by all. We do not so understand the decision. On the part of the appellant it was contended that the county court of Milwaukee county had power to issue the writ of error *coram nobis;* while on the part of the respondent it was insisted that the writ of error *coram nobis* or *coram vobis* does not lie in this state. The point was left undecided.

So far as we are advised, the writ of error to remove cases from inferior courts to the circuit court for review has never been used in this state although frequent opportunities have arisen for the use of the writ. This would seem to indicate that the bar of the state has not considered that the circuit courts have such power.

The legislature established the civil court, inferior to the circuit court, and provided for an appeal to the circuit court, and review therein, in substantially the same manner as judgments of justices' courts are reviewed. *Fred Miller B. Co. v. Milwaukee,* 150 Wis. 336, 136 N. W. 157; *Milwaukee v. Simons,* 93 Wis. 576, 67 N. W. 922.

The judgment of the circuit court on appeal from the civil court becomes the same as if originally entered in the circuit court and "shall thereupon become, for all purposes, the judgment of said circuit court." Hence it could be reviewed on writ of error by the supreme court. Ch. 549, Laws of 1909.

We are convinced that the circuit court has no power to issue the writ, therefore the order dismissing the writ was right.

*By the Court.*—The order appealed from is affirmed.

MARSHALL, J. (*concurring*). This case seems to be a simple one. The vital question is plainly answered by familiar decisions of this court and of the supreme court of Michigan, by sixty years and more of practical construction

and by the very language of the constitutional grant of power to circuit courts. Therefore I am moved to make an effort to eliminate that which seems unnecessary and may be diverting and confusing, and point out the conclusive reasons upon which I understand the decision here rests.

*Jackson v. State,* 92 Wis. 422, 66 N. W. 393; *Buttrick v. Roy,* 72 Wis. 164, 39 N. W. 345, and similar cases are cited, holding that the scope of the writ of error, denial of which was prohibited by the constitution, is the same as at common law.

Why trouble ourselves about whether territorial courts which had trial jurisdiction, somewhat similar to that of our circuit courts, had authority to issue writs of error? It is the prohibition of the writ which the constitution deals with, not prohibition as to any particular court. The cited cases deal with the scope of the writ, of which there is no question here, and concern only the writ as issued by this court. So, much discussion in the briefs of counsel and in the main opinion might well have been omitted. It rather tends to divert and confuse than enlighten.

It is said the language granting authority to circuit courts to issue writs does not mention the one in question. That is rather misleading without a companion suggestion that there is the same omission in the grant to this court, though power of the latter to issue such writs is unquestioned. It seems evident that the omission, by itself, has no significance. The general language, common to both grants, is appropriate to exclude or include writs of error, according to the function of the grant. Eliminating the environment of the two unimportant matters stated, this case comes down to a very narrow compass.

The constitutional provision that the writ of error shall not be prohibited, is a limitation on legislative power, and no infraction of it is involved here.

Can the writ of error be issued by any other court than

this,—or even from this in case of the right of appeal existing,—to secure a retrial or other review? is a different question. In respect to the major part of the question suggested, from an original standpoint, there might be some uncertainty; but the circumstance of our judicial system having been in existence upwards of sixty years without the writ of error having been considered an instrumentality of circuit courts, may well be taken, as conclusive in the negative, by practical construction, and that the constitutional prohibition refers to use by this court and legislation to prevent it.

Since the grant to this court, by necessary implication, as has always been held, includes the right to use the writ of error in its ancient field, it must be seen that it was such power the prohibition was designed to guard. As the grant of power to the circuit court was evidently intended to be comprehensive, including all authority to be exercised and excluding all other power, unless the defined measure of it includes, to issue "writs and to hear and determine the same," in the words of the grant to this court, the power does not exist. The power is thus defined:

"The circuit courts shall have . . . appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. They shall also have the power to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari,* and all other writs necessary to carry into effect their orders, judgments and decrees, and to give them a general control over inferior courts and jurisdictions." Sec. 8, art. VII, Const.

That no instrumentality was given this court by the constitution for exercising appellate jurisdiction was decided in *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 521, and *State ex rel. Milwaukee Med. College v. Chittenden,* 127 Wis. 468, 508, 107 N. W. 500, in harmony with early adjudications in Michigan, holding that such jurisdiction must wait upon legislative action giving the right of appeal and providing machinery for its exercise.

In *Sullivan v. Haug,* 82 Mich. 548, 557, 46 N. W. 795, the Michigan court decided, as it had many times before commencing with *People ex rel. Jeschly v. Police Justice,* 7 Mich. 456, that

"When . . . the constitution clothed the circuit courts with appellate jurisdiction, it used that term in its known signification. It referred to such cases as the legislature should provide for appealing and retrial in the circuit court. As there is no writ of appeal, or process by which the circuit court can bring the cause up from the inferior court for a retrial, it is evident that this provision of the constitution contemplated legislative action in order to bring the cause within the jurisdiction of the circuit court to retry."

Now the question of whether the constitutional grant, in general language, to use writs, includes that of error, or any other in aid of appellate jurisdiction, is ruled in the negative by the very language of the grant, by *Att'y Gen. v. Railroad Cos., supra,* and *State ex rel. Milwaukee Med. College v. Chittenden, supra.* The grant to circuit courts was to issue writs "to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions," in other words, as said in *Att'y Gen. v. Railroad Cos.,* as an "appurtenance to their original jurisdiction." The grant to this court was to issue writs "and to hear and determine the same." Note that the grant to the former was for the purpose of exercising original jurisdiction while the grant to the latter is general, no use being mentioned. Thus, in the one, the use is defined and excludes appellate jurisdiction, while in the other it is not defined except by the scope of the writ. In *Att'y Gen. v. Railroad Cos., supra,* speaking of the distinction between the grant to circuit and that to this court, it was said that the grant to the former was for the purpose of affording instrumentalities for exercising original jurisdiction, while the grant to the latter was for jurisdiction. Note the language: "The writs are given to the circuit court as an appurtenance to their general

original jurisdiction, to this court for jurisdiction. Those courts take the writs with unlimited jurisdiction of them, because they have otherwise general original jurisdiction."

To recapitulate, laying aside what might be held, if the question presented were new, that the framers of the constitution did not intend to confer or recognize the existence of power in the circuit courts to use the writ of error, is ruled in the affirmative by more than sixty years of practical construction; that they did not intend to grant to circuit courts power to use the writ of error as an incident of appellate jurisdiction, is ruled by the express words of the constitution limiting the use of writs to that of instrumentalities for the exercise of original jurisdiction, by the previous decisions of this court referred to, declaring and applying the law, and the decisions of the state from which our constitutional provisions on the subject were taken.

WINSLOW, C. J. I concur in the opinion of Mr. JUSTICE MARSHALL.

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ALTSCHULER, Respondent, vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant.

*October 31—December 9, 1913.*

*Carriers: Contracts: Validity: Interstate transportation: Federal laws: Burden of proving illegality: Damages for breach of contract: Special circumstances: Delay in delivering baggage of orchestra: Inability to give concert: Evidence of losses.*

1. In an action for breach of contract for interstate transportation, the rule that Congress has the paramount right to legislate respecting interstate traffic has no application unless the contract was in violation of the federal law.
2. As a general rule, in actions for breach of contract a person can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of the parties at the time of making the contract.

3. But where special circumstances exist, mutually known and contracted with reference to, the parties are presumed to have had in contemplation, as a result of the breach, such damages as may reasonably and fairly be considered as arising naturally, that is, in the usual course of things, from such breach under the special circumstances.
4. A common carrier contracting with the proprietor of an orchestra for a definite itinerary and to reach a certain city on a certain day at a specified hour in the forenoon, may be held responsible for the loss of receipts for a scheduled afternoon performance, although its agent had no knowledge that such performance was to be given, or the terms under which it was to be given.
5. The burden of proof is upon a carrier sued for a breach of a contract of transportation to prove the illegality of a contract if such illegality exists under the Interstate Commerce Act.
6. Where plaintiff, suing for breach of contract for the transportation of his orchestra and their baggage, was to receive a certain percentage of the gross receipts of an afternoon performance which could not be given because of such breach, he was properly allowed to recover such percentage of the total sale of tickets without deduction for possible expenses of which there was no evidence.
7. The evidence in such case upon which the jury based a finding that plaintiff lost a certain amount by reason of diminished attendance at the evening performance, caused by the delay in delivering the baggage, is *held* to be speculative and conjectural and hence insufficient to sustain such finding.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Modified and affirmed.*

This action was brought to recover damages for the alleged breach of contract to transport the members of plaintiff's orchestra, their instruments and baggage from Denver, Colorado, to Milwaukee, Wisconsin, by failing to deliver the car containing the baggage and instruments to the Chicago, Milwaukee & St. Paul Railway Company at Chicago in time to make connections with a certain train, No. 5, leaving Chicago at 9:15 a. m. and arriving in Milwaukee at 11:15 a. m., May 30, 1911, in consequence of which the orchestra was unable to give a matinee performance at Milwaukee on the after-

noon of said day, and also in consequence of such delay the sale of tickets for the evening performance was diminished. Knowledge on the part of the defendant of the general business of the plaintiff and that the plaintiff was to give a matinee performance on the afternoon of the day in question is specifically alleged in the complaint.

The defendant answered by way of admissions and denials, admitting that the car containing the instruments and baggage was not delivered to the Chicago, Milwaukee & St. Paul Railway Company in time to be attached to train No. 5 and was not delivered to said company until noon of that day and arrived in Milwaukee about 7 o'clock that evening. All the allegations of the complaint tending to show knowledge on the part of the defendant that the object of having the baggage car arrive at Milwaukee on train No. 5 was to enable plaintiff to give a matinee performance in the afternoon were denied. Defendant denied certain other allegations of the complaint.

The Milwaukee A Capella Chor was made a party plaintiff, but on the trial the action was dismissed as to it.

The defendant moved for a directed verdict in its favor, which was denied. The jury returned the following verdict:

"(1) What was the amount in dollars of the sale for the afternoon performance? *A.* $1,300.

"(2) What was the amount in dollars, if any, of tickets for the evening performance that were lost on account of the delay in delivering the baggage? *A.* $900."

The usual motions were made by the defendant on the verdict and overruled and judgment entered in favor of the plaintiff upon the verdict for sixty-five per cent. of the damages returned, being the amount which it is alleged under the contract plaintiff was entitled to of the receipts.

Judgment was ordered by the court in favor of the plaintiff, *Jacob Altschuler,* for sixty-five per cent. of the gross receipts found by the jury. It was further adjudged that the Milwaukee A Capella Chor take nothing in the action.

For the appellant there was a brief by *Henry V. Kane, James L. Coleman,* and *Homer W. Davis,* attorneys, and *Robert Dunlap,* of counsel, and oral argument by *Mr. Kane* and *Mr. Coleman.*

For the respondent there was a brief by *George J. Graebner* and *Kanneberg, Cochems & Wolfe,* and oral argument by *Mr. Graebner.*

KERWIN, J. The principal issues in the case, as contended by appellant, are: (a) Did the defendant contract to transport the orchestra and baggage from Denver to Milwaukee? (b) Was the alleged contract legal? (c) Did defendant have notice that plaintiff wanted to use the baggage at Milwaukee in the afternoon for a matinee performance? and (d) What was the amount of plaintiff's legal damages?

1. The first two propositions may be considered together, because they involve the validity of the contract between plaintiff and defendant.

It is insisted that this case is ruled by the federal law, and that under it it must appear that the party sought to be charged, with full knowledge that such profit would be lost upon a breach by him, actually agreed to pay the same in the event of nonperformance; and furthermore that the plaintiff could not recover under the common law as laid down by the state courts. Several authorities are cited to these propositions by counsel for appellant. *Adams Exp. Co. v. Croninger,* 226 U. S. 491, 33 Sup. Ct. 148, is to the effect that Congress has the right to legislate respecting interstate traffic and that when Congress has acted such legislation is paramount to state laws on the same subject. But it is also held in that case that a common carrier cannot exempt himself from liability for his own negligence or that of his employees, but that the rigor of the rule may be modified by reasonable agreement with the shipper which does not include exemption from negligence.

The above and other similar cases cited by appellant are

not in point if the proof in the instant case does not establish that the contract was in violation of the federal law.

*Siggins v. C. & N. W. R. Co.* 153 Wis. 122, 140 N. W. 1128, merely holds that under the Interstate Commerce Act the interstate commission and the federal courts have exclusive jurisdiction of all claims for overcharges on interstate shipments whether they grow out of an excessive rate or out of misrouting.

In the instant case a *prima facie* case of breach of contract was made against the defendant in failing to transfer the baggage car at Chicago so as to be carried by train No. 5 over the Chicago, Milwaukee & St. Paul road to Milwaukee. The *prima facie* case was not met by defendant, or any explanation given why the baggage car was not transferred so as to be carried on train No. 5 as agreed. It is further argued that no case was made for damages because the agent of defendant at Denver, who made out the itinerary, was not informed and did not know that if the baggage did not arrive at Milwaukee on train No. 5 a matinee performance would be lost to plaintiff and the attendance of the evening performance greatly diminished; and that the agent did not know and was not informed of the contract of plaintiff, *Altschuler,* with the powerful and influential Chor Company, and the advertising used to make the performance attractive, hence that the damages sought to be recovered cannot be held to have been reasonably in contemplation of the defendant, in the absence of specific notice.

The cases cited on this point by counsel for defendant include *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 11 Sup. Ct. 500; *Globe R. Co. v. Landa C. O. Co.* 190 U. S. 540, 23 Sup. Ct. 754; *Pennypacker v. Jones,* 106 Pa. St. 237; and the leading English case, *Hadley v. Baxendale,* 9 Exch. 341. But a careful examination of these cases convinces the court that they do not rule the instant case against the respondent. We shall not extend this opinion by a dis-

cussion of the great number of cases cited, but only briefly refer to a few claimed to be specially in point. It is true the general rule is that a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract.

In *Howard v. Stillwell & B. Mfg. Co., supra,* suit was brought to recover balance on a contract for reconstruction of a mill. The contract provided that the company should so reconstruct the mill as to produce 200 more barrels of flour in twenty-four hours. The defense was loss of profits of $12,000 in the milling business during the delay. The item of damages was disallowed on the ground that the alleged damages were too remote and speculative and did not result from the breach alleged.

In *Globe R. Co. v. Landa C. O. Co., supra,* the court at page 543 laid down the rule thus:

"The extent of liability in such cases is likely to be within his contemplation, and, whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind. For instance, in the present case the defendant's mill and all its oil might have been burned before the time came for delivery. Such a misfortune would not have been an excuse, although probably it would have prevented performance of the contract. If a contract is broken the measure of damages generally is the same, whatever the cause of the breach. We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made."

*Pennypacker v. Jones, supra,* was similar in its facts, and it was held that the damages were too remote and speculative to form a basis for recovery.

*Southern R. Co. v. Reed,* 87 Fed. 149, is also relied upon by appellant. In that case Reed and his theatrical troupe

were passengers on defendant's railroad. The train was derailed. Suit was brought against the railway company. The principal question was whether Reed should be allowed damages for loss of profits of the troupe because prevented from meeting engagements at several places where they were scheduled to perform. The court said:

"In the absence of a definite contract for carriage to a given point by a given time, with such reasons for its making as would naturally lead the agent of the carrier to contemplate the profits the passenger expected to realize, it is clear that the damage claimed for the failure to realize such profits is too remote and uncertain, and that until competent proof tending to show such contract was offered and admitted it was error to admit any testimony in reference to the speculative profits which the passenger might have made if he had been safely carried through on schedule time."

*Bradley v. C., M. & St. P. R. Co.* 94 Wis. 44, 68 N. W. 410, is clearly not in point, because no information was given the defendant as to contents of boxes or of any special use to which the contents were to be put. In all the cases cited in appellant's brief on this point it appears that the railway companies had no knowledge of special circumstances charging them with notice.

In the case at bar there was knowledge of special circumstances. There was a definite itinerary prepared by defendant for the plaintiff. The defendant knew the nature of plaintiff's business and knew that plaintiff was to be guided by the itinerary in giving performances by his orchestra. The itinerary gave dates, time of arrival and departure at different points on the route, ending with arrival at Milwaukee on train No. 5 at 11:15 a. m. May 30th. It provided for "one (1) 60-foot end-door baggage car, which will be set at Denver for loading not later than noon, Thursday, May 25th, and run through all movements Denver to Milwaukee."

It is insisted by appellant that defendant did not have knowledge that a performance was to be given in the after-

noon. Whether it had such knowledge or not is immaterial. It did know of the general character of the plaintiff's business, that he was traveling to give performances, and was booked to arrive in Milwaukee in the forenoon of May 30th. The agent of defendant who prepared the itinerary testified that he had had considerable experience in handling itineraries for theatrical companies, and that he handled many during his four years' service at Denver, and that plaintiff's agent gave him information as to the route plaintiff was to take.

This court has many times laid down the rule as to what damages may be recovered under the rule of *Hadley v. Baxendale,* 9 Exch. 341. *Anderson v. Savoy,* 137 Wis. 44, 118 N. W. 217; *Foss v. Heineman,* 144 Wis. 146, 128 N. W. 881; *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119; *Hammer v. Schœnfelder,* 47 Wis. 455, 2 N. W. 1129. The rule is firmly established in this court that the damages which may be recovered for breach of contract are such as may fairly and reasonably be considered as either arising naturally, that is, according to the usual course of things, from the breach of the contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it. *Foss v. Heineman, supra.* Other cases in point: *Chappell v. Western R. of Ala.* 8 Ga. App. 787, 70 S. E. 208; *Western v. B. & M. R. Co.* 190 Mass. 298, 76 N. E. 1050; *Simpson v. L. & N. W. R. Co.* L. R. 1 Q. B. D. 274; *Jameson v. Midland R. Co.* 50 L. T. Rep. 426.

In *Foss v. Heineman, supra,* this court said:

"Extraordinary situations so mutually known and contracted with reference to, are liable to occur, and that gives rise to the necessary supplementary rule that, in any such a case, the parties are presumed to have had, at the inception of their agreement, in mutual contemplation as a result of the breach of it, such damages as may reasonably and fairly be

considered as arising according to the usual course of things from such breach under the special circumstances"

It is further contended by appellant that plaintiff is barred from recovery under the Interstate Commerce Act; that any agreement in relation to interstate transactions not evidenced by tariff and tickets is a violation of the act and illegal. The difficulty with this part of appellant's argument is that the facts do not support it. The contention of defendant under this head is that by the contract the plaintiff received some special favor or advantage repugnant to the federal law. But there is nothing in the evidence or record to support this position. On the contrary the record shows by admission in defendant's answer and stipulation in open court that plaintiff paid the lawful rate of fare and that the tariff rates material to the case were put in evidence and showed compliance by plaintiff and his troupe with such rates. So that *prima facie,* at least, the proof showed no violation of the federal law, and if any such there was it devolved upon the defendant to prove it. It does not appear that any service was given plaintiff that was not open to all and according to law. So the cases cited by appellant under this head have no bearing upon the instant case.

It is further urged that the plaintiff was not entitled to recover sixty-five per cent. of the amount found by the jury; and moreover that the findings are based upon improper and incompetent evidence.

The claim of the defendant is that since there was no afternoon performance some expense must have been saved, and that such amount should be deducted from the gross receipts as found by the jury. The baggage car not having arrived in time, no performance was held in the afternoon, and the jury found the amount in dollars of the sale of tickets for the afternoon performance. We think this claim of defendant cannot be sustained. The contract between plaintiff and the Milwaukee A Capella Chor allowed plaintiff sixty-five per

cent. of the gross receipts and the plaintiff made claim to such amount in making his case. The defendant offered no evidence on its part, nor did it attempt to draw any evidence from the plaintiff's witnesses on the subject, but permitted the plaintiff's *prima facie* showing to stand unquestioned. Under such circumstances we think the defendant cannot now contest in this court the plaintiff's right to recover sixty-five per cent. of the gross receipts.

On the point that the findings of the jury are based upon improper and incompetent evidence we have found some difficulty. Both findings are attacked by counsel for appellant. Without going into any lengthy discussion of the errors committed respecting proof of damages under the second finding of the jury regarding diminished attendance at the evening performance in consequence of the late arrival of the baggage car, it is sufficient to say that we think there is no sufficient competent evidence to support the finding. All the evidence offered on this finding was speculative and conjectural and could not form a basis from which the jury could find any damages. Much of the evidence admitted under objection was clearly incompetent. The evidence produced as to the gross receipts for the afternoon performance, and which were refunded because of the breach of the contract in failure to deliver the baggage car through the negligence of the defendant, was competent and sufficient to support the finding of the jury on the first question of the special verdict.

The judgment appealed from must therefore be modified by striking out the damages found in the second question and awarding judgment for sixty-five per cent. of $1,300.

*By the Court.*—The judgment is modified by reducing the amount of recovery to $845 damages and $87.28 costs in the court below; in all, damages and costs, $932.28, and as so modified is affirmed. The appellant is entitled to costs in this court.

BARNES, J. (*concurring*). I concur in the result. The defendant sold party-rate tickets as it had the right to do under the law, and the rate charged conformed to the published tariffs. A special contract, however, was made in reference to the transportation by which the defendant agreed to furnish certain kinds of cars for the accommodation of the party and also agreed to furnish a sixty-foot baggage car and to deliver it in Milwaukee at a specified time and when the passengers were scheduled to arrive. This contract might well give a preference or advantage so as to create an unjust discrimination under the Interstate Commerce Law. The defendant, however, failed to prove that no rule, regulation, or form of contract was published or filed whereby the same advantages were offered to all aggregations traveling under like circumstances and conditions. We cannot presume that the parties violated the law, and I think the absence of the proof is fatal to the defendant's contention that the contract was illegal. Had the proof suggested existed and been made, I should have reached a different conclusion on the merits of the case.

WINSLOW, C. J. I concur in the views expressed by Mr. Justice BARNES.

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BOEHMER and others, Appellants, vs. KALK, imp., Respondent.

*November 18—December 9, 1913.*

*Life insurance: Policy issued to husband for benefit of wife: Assignment by husband: Vested rights: Regulation of marriage relation: Constitutional law: Statutes: Validity.*

1. The rule that one who insures his own life for the benefit of another and pays the premiums himself may at any time dispose of the policy or may will it away without consent of the beneficiary, was changed, so far as policies in favor of married

women are concerned, by ch. 376, Laws of 1891, which amended sec. 2347, R. S. 1878, so as to provide in substance that any such policy either assigned or made payable to a married woman or to a trustee for her benefit should be her sole and separate property, free from the control, disposition, or claims of her husband.

2. The right of a husband to sell, assign, and dispose of a policy of insurance upon his own life for the benefit of his wife, issued prior to passage of ch. 376, Laws of 1891, and upon which he paid the premiums, was a valuable property right and was fully vested; and in so far as said act of 1891 attempted to deprive him of that right it is invalid.

3. The public has the right to control and regulate the marriage relation and the property rights of the parties thereto by such reasonable and appropriate regulations as do not unnecessarily interfere with those rights of person and property which both state and federal constitutions were framed to protect; but the interests or welfare of the public do not make necessary any such considerable extension of the police power as would be involved in holding that a vested property right, such as the right of selling, assigning, or willing a policy of insurance, can be taken away from the husband by legislative act.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

*W. O. Thomas,* for the appellants.

For the respondent there was a brief by *George L. Blum,* attorney, and *V. W. James,* of counsel, and oral argument by *Mr. James.*

WINSLOW, C. J. The controversy here is as to the ownership of the moneys due on a life insurance policy issued to John Boehmer in June, 1868, "for the sole use and benefit of *Clara Boehmer,* his wife, and their children." In October, 1898, John Boehmer assigned the policy to the respondent, *Anna M. Kalk* (his daughter by a former marriage). He died in 1912, and the contest is between the plaintiffs, who are the beneficiaries named in the policy, and the defendant, who claims as assignee.

Since a very early day it has been held in this state that

one who insures his own life for the benefit of another and pays the premiums himself may at any time dispose of the policy, or may will it away without consent of the beneficiary. See *Clark v. Durand,* 12 Wis. 223, and subsequent cases, the most recent of which is *Armstrong v. Blanchard,* 150 Wis. 31, 136 N. W. 145. This rule was changed so far as policies in favor of married women are concerned by ch. 376 of the Laws of 1891, which amended sec. 2347 of the Revised Statutes of 1878 by adding thereto in substance clauses providing that any such policy either assigned to or made payable to a married woman or to a trustee for her benefit should "be the sole and separate property of such married woman," free from the "control, disposition or claims of her husband." This act further provided that its provisions should "apply to all insurance on lives effected before" its passage.

The intention to make this change in the statute apply to existing policies is plain, and the question arising here is whether it is competent for the legislature to make it so apply.

There can be no doubt that when this policy was issued and the premiums thereon were paid by the insured it became his property. The principle of law which had long previously been adopted in this state giving to the husband the absolute power of disposition and control of such policies was, upon very familiar principles, written into the policy in legal effect, and became a part thereof. It was a valuable property right and was fully vested. The general rule is that such a right cannot be taken from one person and transferred to another by the legislature. Such a transfer offends against both state and federal constitutional provisions. *Osborn v. Hart,* 24 Wis. 89; *Culbertson v. Coleman,* 47 Wis. 193, 2 N. W. 124; *Wis. W. Co. v Winans,* 85 Wis. 26, 54 N. W. 1003.

Both parties claim that this court has expressly or impliedly passed upon the question of the application of this

law to existing contracts, but we do not think it can be held that the question has been in any sense authoritatively decided.

The case of *Ellison v. Straw,* 116 Wis. 207, 92 N. W. 1094, was the first case in which the question of the effect of the amendment of 1891 was touched upon. In this case the policies were issued prior to 1891, and were for the benefit of the wife in case she survived her husband, otherwise for the benefit of the husband's estate. A paid-up life policy, payable to the same beneficiaries, was issued in place of one of the original policies in the year 1900, and the other policy became a paid-up life policy during the same year. The question in the case was whether judgment creditors of the husband and wife could reach the policies in a creditors' action, and subject them to the satisfaction of their judgments. In neither brief was the change made in the law by ch. 376 of the Laws of 1891 noticed. Both parties seemed to consider the amended section as applicable to the case, though they differed as to its effect. The court treated it in like manner and proceeded to apply it to the case, holding not only that such a policy could not be reached by her creditors or her husband's creditors, but also that neither she nor her husband could assign the same.

In *Canterbury v. Northwestern Mut. L. Ins. Co.* 124 Wis. 169, 102 N. W. 1096, the question whether the husband and wife together could, after the passage of the law of 1891, assign a policy of this kind issued prior to the passage of that law, was squarely presented. In this case the court came to the conclusion that such a policy could be assigned by husband and wife prior to the act of 1891, and that, assuming the act of 1891 to be applicable to policies issued before its passage, still that act had not affected the right of assignment by the husband and wife acting together, and the holding to the contrary in the *Ellison Case* was withdrawn. In

*Perkinson v. Clarke,* 135 Wis. 584, 116 N. W. 229, the statute was referred to in the opinion by Mr. Justice BASHFORD as applying to all insurance theretofore effected, but the remark was not necessary to the decision, because the question to which it was cited as applicable had been already decided in the immediately preceding sentence on another ground. It also appears upon examination of the briefs in the case that the statute in question was not referred to by either party or cited as bearing on the case. It is certain that in no case where the proposition was squarely raised and argued has this court passed upon the question now before us, namely, the question whether the amendment of 1891 can have any effect on the assignability of insurance policies under which married women had become beneficiaries prior to the passage of the amendment.

As has been previously said in this opinion, it seems very clear that the right of the husband to sell, assign, and dispose of such a policy which existed prior to the act of 1891 was a valuable property right, which became fully vested in the husband when the policy was issued and the premiums were paid by him. Both state and federal constitutions protect vested property rights from legislative invasion, except where, in the proper exercise of the police power and in order to preserve and protect the public health, morals, safety, or welfare, it becomes necessary to interfere with and affect property rights, but such interference cannot extend beyond those measures or acts which are appropriate and reasonably necessary for the accomplishment of the purpose. *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 418, 72 N. W. 1118; *State ex rel. Winkler v. Benzenberg,* 101 Wis. 172, 76 N. W. 345; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137.

The marriage relation is one of the most important of those fundamental social facts or relations upon which both civilized society and government rest. The interest of the pub-

lic in its preservation and in the fair and equitable enjoyment and control of property rights by the husband and wife respectively, to the end that the relation may be permanent and satisfactory, is very great. Consequently there can be no doubt of the right of the public to control and regulate both the relationship itself and the property rights of the parties to the relation, by such reasonable and appropriate regulations as do not unnecessarily interfere with those rights of person and property which both state and federal constitutions were framed to protect. *Baker's Ex'rs v. Kilgore,* 145 U. S. 487, 12 Sup. Ct. 943; *Niles v. Hall,* 64 Vt. 453, 25 Atl. 479; *Bennett v. Harms,* 51 Wis. 251, 8 N. W. 222.

The regulations deemed necessary to accomplish these results have been very numerous in recent years, and the common-law rights of the husband in his wife's property and earnings have been very greatly modified and in many states abolished by the various Married Women's Acts which have been placed upon the statute books. These regulations, so far as they relate to marriages existing prior to their enactment, have been sustained by the courts with practical uniformity in so far as they affect merely inchoate rights, such as inchoate rights of dower or curtesy, the husband's unexercised right to reduce the wife's personal estate to his possession and control, and the right to further profits of property belonging to the wife. *Bennett v. Harms, supra; Percy v. Cockrill,* 53 Fed. 872; *Baker's Ex'rs v. Kilgore, supra;* Spencer, Dom. Rel. secs. 195, 203, 236. In some jurisdictions, however, the right of the husband to reduce his wife's personalty to his possession has been held to be a vested right and not subject to change by the legislature, even though yet unexercised. *Westervelt v. Gregg,* 12 N. Y. 202.

It may be said that the decisions are practically unanimous to the effect that while the legislature may rightfully take away mere inchoate or expectant interests of the hus-

band and may also exclude him from acquiring rights in property subsequently accruing to his wife, notwithstanding the marriage exists when the statute is passed, it cannot constitutionally take away rights of property already *vested* in him by virtue of the marriage. Spencer, Dom. Rel. sec. 236; 8 Cyc. 908; Cooley, Const. Lim. (7th ed.) 513 *et seq.*

This principle is so firmly entrenched in the decisions that it seems to be not open to doubt or question.

We have discovered no good reasons for holding that the interests or welfare of the public make necessary so considerable an extension of the police power as would be involved in holding that a vested property right, such as the right of selling, assigning, or willing a policy of insurance, can be taken away from the husband by legislative act. These views are decisive of the case.

Other questions are argued and have been considered, but it is not deemed necessary to discuss them.

*By the Court.*—Judgment affirmed.

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BARTL, Respondent, vs. C. H. STARKE DREDGE & DOCK COMPANY, Appellant.

*November 18—December 9, 1913.*

*Appeal: Review: Questions of fact.*

**The circuit court's determination on a pure matter of fact will not be disturbed upon appeal unless the record presents manifest error. So *held* in a case where the circuit court, on appeal from the civil court of Milwaukee county, reversed a judgment of nonsuit and ordered a new trial on the ground that the evidence fairly presented a case for a jury.**

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Action to recover compensation for a personal injury. It

was claimed that while plaintiff and another were stationed on a stack of spiles to guide spiles to a proper location thereon as they were, by a long-armed crane, having a chain with grappling tongs at the far end, lifted to the region above the stack and lowered down, the operation being conducted by an engineer stationed some distance from the men and where he could not readily observe plaintiff, the latter was injured by a spile, without the customary warning, being suddenly dropped on the stack. The cause was first tried in the civil court of Milwaukee county. There, judgment of nonsuit was rendered upon the ground of failure of proof of the attachment to the spile being unloosened by the engineer without signal, or evidence to warrant a reasonable conclusion that the spile was suddenly and without warning dropped by the act of the engineer. Plaintiff appealed to the circuit court. There the judgment of the civil court was reversed and a new trial ordered; it being held that the evidence fairly presented a case for a jury. Defendant appealed.

For the appellant there was a brief by *Burr J. Scott,* attorney, and *Lawrence A. Olwell,* of counsel, and oral argument by *Mr. Scott.*

For the respondent there was a brief by *McCabe & Dahlman,* and oral argument by *L. A. Dahlman.*

MARSHALL, J. The order must be affirmed. The evidence has not been examined with a view of determining, from an original standpoint and by carefully balancing of probabilities, whether the decision of the civil court be right. No such treatment of cases of this sort can ordinarily be expected. It is useless to appeal from a circuit court's determination on a pure matter of fact, unless the record presents manifest error. Appreciation that, under our judicial system, the trial, or first court of review, on mere matters of fact, is practically supreme in all ordinary cases, will greatly promote the speedy economical termination of litigation. To

come here, unless counsel are pretty clearly convinced of there being no room whatever in the evidence for the decision of the circuit court, in general, means mere delay and waste, both public and private.

The record in this case comes quite short of showing error within the field above indicated. It has been examined to the point of convincing this court of that and there the investigation rests. It is not thought best, ordinarily, to review, analyze, and weigh the evidence in an opinion in such a case, stating at length and with precision just how the conclusion was reached here. This case has no distinguishing characteristics to render it an exception. It is a very ordinary instance of the circuit court thinking the evidence to be open to reasonably conflicting inferences on the vital matter of fact, requiring the question of which is the proper inference to be submitted to the judgment of a jury. In that field, in general, the circuit court will not be overruled even if here, viewing the evidence from an original standpoint, it seems probable that a different decision might be better supported. There must be practicably no reasonable warrant for the decision or it will not be disturbed.

*By the Court.*—The order is affirmed.

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LINDENMANN, Appellant, vs. KOPCZYNSKI, Respondent.

*November 18—December 9, 1913.*

*Building contracts: Breach: Substantial performance: Measure of damages: Sale of property: Appeal: Record: Bill of exceptions: Milwaukee civil court.*

1. For the contractor's breach of a building contract by substitution of inferior flooring in place of that specified, the owner may recover such damages as were caused thereby—under the rule laid down in *Foeller v. Heintz*, 137 Wis. 169, and other cases,—although before discovery of the breach he accepted the completed building and sold the property for as much as he would have received if the inferior flooring had not been used.

**2. Where there is no new trial in the circuit court upon appeal from the civil court of Milwaukee county, the record on that appeal is before the supreme court on an appeal from the circuit court, without any bill of exceptions.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action was brought in the civil court of Milwaukee county to recover for breach of contract. The complaint alleges that in consideration of $4,000 the defendant agreed to erect and construct two certain flat buildings on the premises described, and among other things agreed that the flooring in said buildings on the first and second floors of each should be No. 1 maple flooring, and that the defendant, without the knowledge and consent of the plaintiff and contrary to the terms of the agreement, substituted and laid in said buildings floors of beech wood, and that by reason of said change the floors spread, warped, and became unfit for use, which unfitness was due to the inferiority of the beech flooring, in consequence of which plaintiff suffered damages in the sum of $258, for which sum plaintiff demanded judgment.

The answer was a general denial. The civil court ordered a nonsuit and judgment was entered accordingly, and the plaintiff appealed to the circuit court. It appeared on the trial in the civil court that before the commencement of the action the plaintiff sold the premises upon which the buildings were situate. The civil court rendered an opinion which appears in the record, in which he found that the plaintiff received as much from the sale of the property as if maple flooring had been put in the buildings as agreed, therefore plaintiff sustained no damages and could not recover damages unless he was legally liable to the vendees in the contract of sale upon representations made by him; and further found that it appears that he sold the buildings together with the land not knowing that there was a breach of con-

tract on the part of the defendant, upon which ground the court based its juagment of nonsuit. The civil court held that no damages were proven and for that reason there could be no recovery. In the circuit court the plaintiff moved to reverse the judgment of the civil court and the defendant moved to affirm. The defendant's motion was granted, and judgment was entered in said circuit court dismissing the action with costs against the plaintiff, from which judgment plaintiff appealed to this court.

The cause was submitted for the appellant on the brief of *Lorenz & Lorenz,* and for the respondent on that of *Fitzsimmons & Flynn.*

KERWIN, J. The civil court in a written opinion in the record nonsuited the plaintiff for the reason that it did not appear that plaintiff sustained damage because the court held that he sold the property for as much as if the floors had been maple. The court also, inferentially at least, concedes that a contract was made as contended by plaintiff, but held that no damages were shown for the reason before stated. A claim was also made that the plaintiff consented to a substitution of beech for maple flooring after the contract had been made and to that extent the contract was modified. The evidence does not establish a substitution of beech flooring for maple by consent of plaintiff. The burden was on defendant to show such change in the contract. Only two witnesses testified on the subject, plaintiff and defendant, the defendant affirming that a change was consented to and plaintiff denying it. Moreover, there are circumstances which corroborate the plaintiff on this point. So we are convinced that defendant did not prove a change in the contract.

It is, however, insisted that since there is no bill of exceptions the evidence cannot be considered. Under the civil court act no bill of exceptions was necessary in this case.

The evidence was certified up by the clerk and was before the circuit court on a motion to affirm or reverse. Ch. 549, Laws of 1909, as amended. The record on appeal from the civil court to the circuit court, where there is no new trial in the circuit court, is before this court without a bill of exceptions on appeal from the circuit court to this court under the act establishing the civil court. Ch. 549, Laws of 1909, as amended. The evidence shows that the beech flooring was much inferior to maple, and that the plaintiff is entitled to such damages as resulted from the breach. The plaintiff accepted the property after completion without knowledge of the breach and sold it before discovery. The theory of the court below that plaintiff lost nothing by the substitution of beech for maple flooring because he sold the property for the same price as if there had been no breach we need not consider. That question was not in the case. The plaintiff's case was based upon a contract and breach and he was entitled to recover the damages which the law awards. Whether the plaintiff is liable to his vendee or not, or whether he received as much for the buildings as if they contained maple floors, is wholly immaterial in this case.

It follows that the civil court was in error in granting the nonsuit, and the court below erred in affirming the judgment of the civil court.

The plaintiff is entitled to recover such damages as he may be able to show were caused by the breach under the rule laid down by this court in the following cases: *Foeller v. Heintz,* 137 Wis. 169, 118 N. W. 543; *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356; *Arndt v. Keller,* 96 Wis. 274, 71 N. W. 651; *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 81 N. W. 136.

*By the Court.*—The judgment of the court below is reversed, and the cause remanded with directions to the circuit court to reverse the judgment of the civil court and for further proceedings according to law.

# ROSHOLT, Respondent, vs. WORDEN-ALLEN COMPANY, Appellant.

*November 18—December 9, 1913.*

***Master and servant: Injury: Line of duty: Unsafe working place: Statutory duty of master: Defenses: Questions for jury: Special verdict: Inconsistency: Appeal: Harmless errors.***

1. Where a helper was employed to carry planks to carpenters who were laying them upon a roof, but failed to supply such planks rapidly enough, and one of the carpenters in going for planks himself was injured by falling from an unsafe runway, the jury was warranted in finding that he was engaged in the line of his duty when injured.
2. The inconsistency of findings that in the exercise of ordinary care defendant ought to have known, but plaintiff ought not to have known, that plaintiff's working place was unsafe, is immaterial where, under sub. 1, sec. 2394—1, Stats., the defense of assumption of risk is not open to defendant.
3. Where a temporary runway upon the nearly flat roof of a building, intended for use in carrying planks to carpenters engaged in laying them on the roof, was twelve feet wide and constructed of planks six inches wide laid loosely upon the roof joists, the master would not be liable at common law to an employee who stepped upon the end of a plank projecting beyond one of the joists and fell to the basement, because (1) a court or jury would not be warranted in finding the place was not reasonably safe and (2) the rule requiring the place of employment to be reasonably safe has no application to building operations where conditions are constantly changing and the dangers arise from acts of the servants themselves in carrying on such operations.
4. But a finding by the jury that such runway was not as free from danger as the nature of the employment would reasonably permit, is *held* in this case to be sustained by the evidence. TIMLIN, J., dissents.
5. Ch. 485, Laws of 1911 (secs. 2394—41 to 2394—71, Stats. 1911), which requires every employer to furnish a place of employment which (excepting places where persons are employed in private domestic service or agricultural pursuits which do not involve the use of mechanical power) shall be as free from danger as "the nature of the employment will reasonably permit," effected a radical change from the common-law rule which required only that the place should be reasonably safe.

6. Under said statute, as to places which from their nature cannot be made safe, or which cannot be made safe without seriously interfering with the work, the employer is required to make them only as free from danger as the nature of the employment will reasonably permit; but (subject to the exception of certain places as above noted) where the conditions are such as will reasonably permit a place to be made safe, it must be made so, regardless of the character of the employment.
7. The duty imposed upon the employer by said statute is an absolute one, and for an injury to an employee caused by its nonperformance liability of the employer follows as a matter of course, in the absence of contributory negligence.
8. The defense of contributory negligence has been taken away by ch. 599, Laws of 1913, as to actions arising after that act became effective, where four or more employees are engaged in a common employment.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

On May 22, 1912, the plaintiff was employed by the defendant as a carpenter, and was engaged in laying boards on the roof of a building then being constructed by the defendant. The boards or planks to be laid were raised to the roof and put in piles at convenient places preparatory to being matched and nailed. These planks were 2 x 6 and were twelve, fourteen, and sixteen feet long. During the early part of the work, plaintiff and another carpenter who was working with him got their supply of planks from various piles convenient to them as they went along. When these were exhausted they were supplied from a pile some distance ahead of them in the direction in which they were working. Between them and this pile of planks there was constructed a temporary runway or walk of these twelve-foot planks loosely laid across the joists of the roof, which joists were about six feet apart. The roof was nearly flat. The joists of the roof ran north and south and the planks being nailed thereto were laid east and west, as were the planks in the temporary runway, such runway being twelve feet wide and about thirty feet long. It was laid by a helper who

was employed to carry the planks to the carpenters, and in doing so he traveled back and forth over it. During the progress of the work the plaintiff went after a supply of planks, and after having picked up several boards started back. In stepping from the pile onto the runway he lost his balance, and in an effort to regain it he stepped on the end of a plank in the runway which projected over one of the joists and he fell through to the basement of the building, a distance of about thirty feet. This action was brought to recover damages for injuries sustained.

The complaint, in substance, charged the defendant with liability by reason of its failure to furnish the plaintiff with a reasonably safe place in which to do his work, failure to warn him that such runway was not reasonably safe, and failure to promulgate rules and regulations for the conduct of its employees. The case was submitted to the jury on a special verdict, which, with the answers thereto, is as follows:

"(1) Was the runway, laid by the helper upon the roof joists, sufficiently safe to make it free from danger to the employees, when carrying lumber from the place it was piled to the place it was used, so far as the nature of their employment reasonably permitted? *A.* No.

"(2) If you answer the first question 'No,' ought the defendant, in the exercise of ordinary care, to have known, before the accident and in time to have prevented the same, that said runway was not sufficiently safe to make it free from danger to the safety of employees when carrying lumber from where it was piled to the place it was used, so far as their employment reasonably permitted? *A.* Yes.

"(3) If you answer the first question 'No,' ought the plaintiff, in the exercise of ordinary care, to have known, before the accident and in time to have avoided the same, that said runway was not sufficiently safe to make it free from danger to the safety of the employees, when carrying lumber from where it was piled to the place it was used, so far as their employment reasonably permitted? *A.* No.

"(4) If you answer the first question 'No,' was the fact that said runway was not sufficiently safe to make it free from danger to the safety of the employees when carrying lumber from the place it was piled to the place it was used, so far as the nature of their employment reasonably permitted, the proximate cause of the injury? *A.* Yes.

"(5) Was the plaintiff required, in the performance of his duties, to carry lumber over said runway? *A.* Yes.

"(6) Did the plaintiff fail to use ordinary care while carrying the two pieces of lumber over the runway just before and at the time of the injury? *A.* No.

"(7) If you answer the sixth question 'Yes,' did such failure of such care proximately contribute to the injury? *A.* (No answer.)

"(8) What sum of money will reasonably compensate the plaintiff for his injuries? *A.* $1,500."

From a judgment entered in accordance with such verdict defendant appeals.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *Charles E. Monroe.*

For the respondent there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Walmsley.*

Barnes, J. The appellant makes the following points: (1) It was error to submit to the jury the first and fifth questions of the special verdict. (2) The answers to the second and third questions are inconsistent and contradictory and both cannot be true. (3) There was no negligence on the part of the defendant. (4) It should be held as a matter of law that the plaintiff was guilty of contributory negligence. (5) The court erred in charging the jury.

1. In reference to the first point made, it is urged that it was no part of the plaintiff's duty to do the work which he was engaged in at the time he was hurt, because there was another person employed to carry the boards to the carpen-

ters, and plaintiff's duty was confined to putting the boards in place on the roof after they were brought to him.

The helper was either unable or unwilling to carry the number of boards needed, and the plaintiff was obliged to either help himself or sit down and do nothing. He was not specifically forbidden to carry boards, and by doing so he was facilitating the work of his employer. It is more than probable that he would have been censured by the foreman in charge of the work had he been found idle because the helper was not carrying the necessary number of boards.

It was, we think, under the circumstances, clearly within the province of the jury to say that plaintiff was engaged in the line of his duty when he was injured. Indeed, we think it would be quite difficult to say that his contract of employment did not contemplate that he should do the very thing which he did do when the occasion for it arose.

2. It may well be that there was no room for the jury in this case to find that the defendant in the exercise of ordinary care ought to have known that the runway was not safe, and at the same time to find that the plaintiff in the exercise of such care ought not to have known that the runway was unsafe. If, however, the third question in the special verdict was immaterial, as we think it was, then the inconsistency between the answer to it and the answer to the preceding question was immaterial.

3. This brings us to a consideration of the most important question in the case, and that is whether or not the evidence was sufficient to warrant the jury in finding any negligence or failure of duty on the part of the defendant which would warrant a recovery in this case.

It is clear that a case of common-law liability was not made by the plaintiff, for two reasons: *First.* The common-law rule required the master to furnish only a "*reasonably* safe" place in which to work. *Howard v. Beldenville L. Co.* 129 Wis. 98, 114, 108 N. W. 48. Considering the substan-

tial character of the runway and the nature of the work that was being carried on, a court or jury would not be warranted in saying that the place was not *"reasonably"* safe. *Second.* The rule requiring that the place of employment be reasonably safe was not even applicable to building operations where conditions were continually changing and where dangers arose from the acts of the servants themselves in carrying on such operations. *Strehlau v. John Schroeder L. Co.* 142 Wis. 215, 217, 125 N. W. 429, and cases cited; *Jakopac v. Newport M. Co.* 153 Wis. 176, 180, 140 N. W. 1060.

So, if any liability exists, it must exist by virtue of ch. 485, Laws of 1911 (secs. 2394—41 to 2394—71, Stats. 1911), or by virtue of some other statute of this state. Said ch. 485 is applicable beyond any doubt to all employees and all employers in this state, excepting only such as are expressly exempted from its operation.

Sec. 2394—48 requires every employer, among other things, to furnish a place of employment *"which shall be safe for employees."*

Sec. 2394—49 provides that no employer *"shall require, permit or suffer* any employee to go or be in any employment *or place of employment* which is not safe."

Sec. 2394—41, sub. 11, provides that "The term 'safe' and 'safety' as applied to an employment or a place of employment shall mean such freedom from danger to the life, health or safety of employees . . . as the nature of the employment will reasonably permit."

Sec. 2394—41, sub. 4, provides that "The term 'employee' shall mean and include every person who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, or to go or work or be at any time in any place of employment."

Sec. 2394—41, sub. 3, defines the term "employer" to "mean and include every person, firm, corporation, agent,

manager, representative or other person having control or custody of any employment, place of employment or of any employee."

Sec. 2394—41, sub. 1, provides: "The phrase 'place of employment' shall mean and include every place, whether indoors or out or underground and the premises appurtenant thereto where either temporary [temporarily] or permanently any industry, trade or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade or business, is carried on, and where any person is directly or indirectly employed by another for direct or indirect gain or profit, but shall not include any place where persons are employed in private domestic service or agricultural pursuits which do not involve the use of mechanical power."

It is obvious that these provisions make some radical changes in the common law as it existed when the act was passed, and that among those changes is the abrogation of the rule referred to as having been laid down in *Strehlau v. John Schroeder L. Co.* 142 Wis. 215, 125 N. W. 429, and kindred cases. It is also apparent that the employer no longer fulfils his duty by furnishing a *"reasonably"* safe place. Instead, he must furnish one which is as free from danger as "the nature of the employment will reasonably permit." This undoubtedly refers to the physical situation. There may be places of employment which from their very nature cannot be made safe. There may be other places which cannot be made safe without seriously interfering with the carrying on of the work. As to such places, the master is required to make them only as free from danger as the nature of the employment will reasonably permit. Where the nature of the employment is such that it will reasonably permit a place to be made safe, then it must be made so regardless of the character of the employment, unless it falls within one of the classes exempted from the operation of the act. And it

might be here remarked that the employers who are exempt from the operation of ch. 485, Laws of 1911, are not as numerous as are those who are exempted from the operation of sub. 2 of sec. 2394—1, being part of the Workmen's Compensation Act as originally passed or as amended by ch. 599, Laws of 1913. Under the original act and the amendment thereto, any employer of less than four employees can avail himself of the defenses of contributory negligence and negligence of a fellow-servant, while all employers under ch. 485, Laws of 1911, must furnish the safe place of employment therein provided for, except where the employee is engaged in private domestic service or agricultural pursuits not involving the use of mechanical power.

The language of the sections of the statute quoted is plain and hardly open to judicial construction. If the statute is drastic there is no reason for thinking that it was not intentionally made so. There is not much doubt that the "Compensation Act" referred to would have been made compulsory instead of optional, were it not that the legislature either thought that a compulsory act would be unconstitutional or else entertained such grave doubts upon the subject that it was considered inadvisable to experiment with a compulsory law. It is evident that the legislature desired that employers generally should come under the act, and that some of its provisions were designed to make it as comfortable for them to come in as to stay out. Ch. 485, Laws of 1911, was intended to supplement ch. 50 of the laws of the same year.

The statute in terms imposes an absolute duty upon the employer to make the place of employment as free from danger as the nature of the employment will reasonably permit, and in the absence of contributory negligence the liability of the master follows as a matter of course if this duty is not performed and injury results to the employee because it is not performed. Such we think is the meaning of the law and the effect of the decision in *Sparrow v. Menasha P. Co.*

154 Wis. 459, 143 N. W. 317. The wording of the statute does not differ materially from the wording of the railroad fencing statute (sec. 1810), under which it has been held that the duty to construct a sufficient fence within the meaning of the statute is absolute. *Curry v. C. & N. W. R. Co.* 43 Wis. 665, 674, and cases cited; *Ulicke v. C. & N. W. R. Co.* 152 Wis. 236, 139 N. W. 189. The duty imposed by the statute we are considering is as imperative as is the duty imposed by sec. 1636—81 (the scaffolding statute), in reference to which it was said in *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 313, 139 N. W. 179, "that the legislature intended to make employers, in the situations dealt with by the statute, absolute insurers of the safety of their employees save in cases of efficient assumption of the risk or contributory negligence;" and we think the duty imposed is as mandatory and as absolute as that imposed by ch. 396, Laws of 1911, which now appears as part of sec. 1636*jj*, and which was undoubtedly passed to change the rule of *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992, and the prior cases on which the decision in the *West Case* was based.

Following the decision in the *Koepp Case,* it was again said in reference to sec. 1636—81 that it "in terms imposes on the defendant *the absolute duty* to furnish safe, suitable and proper apparatus for raising this stack." *Bruce v. Northern B. & S. I. Works,* 152 Wis. 188, 191, 139 N. W. 729. The *Koepp Case* was again followed and approved in *Kosidowski v. Milwaukee,* 152 Wis. 223, 139 N. W. 187. Again in the opinion on rehearing in *Van Dinter v. Worden-Allen Co.* 153 Wis. 533, 543, 138 N. W. 1016, 142 N. W. 122, it was said: "It was held in the *Koepp Case* that the legislature intended to make employers *absolutely liable* as to the safety of employees in the situation embraced in the statute (sec. 1636—81), except where the injured person assumed the risk or was guilty of contributory negligence." The word "absolute" as used in these decisions must mean

"without limitation," unless limitation is expressly made. The intent of the legislature to make a radical change in the common law and to adopt a rule of absolute liability is certainly as manifest in secs. 2394—48, 2394—49, and 2394—41 as it is in sec. 1636—81.

So in actions brought to recover damages for a personal injury under the 1911 statute, where the relation of master and servant exists, and where it is charged that there was a failure of duty to furnish a safe place for the servant to work, and where the plaintiff does not belong to the classes of employees who are exempted, the inquiry is: Was the place as free from danger to the life, health, or safety of the employee as the nature of the employment would reasonably permit? If there is evidence which will warrant a jury in returning a negative answer, a cause of action is established if the servant was injured and the injury was due to the master's failure to comply with the statute and there was no contributory negligence. This latter defense was available under ch. 50 of the Laws of 1911, but was taken away by ch. 599, Laws of 1913, as to actions arising after such act became effective, where four or more employees are engaged in a common employment.

We think it must be said in the instant case that the jury might well find that the place of employment was not as free from danger as the nature of the employment would reasonably permit. The laying of two or three tiers of planks instead of one would in all probability have prevented the accident. It is almost a certainty that the nailing down of the tier that was laid would have prevented it. So would the erection of a substantial guard rail immediately outside of the joists or purlines on which the planks rested. It may well be that there were other things which might have been done to make the place safe which the nature of the work would reasonably permit, but the enumeration given is sufficient. A jury would be well within its rights in saying

that the nature of the work would reasonably permit either of the first two things mentioned to be done, and probably the third. The jury has found that the place was not "safe" within the meaning of the statutory definition of the word, and we think the evidence was ample to warrant such a finding. This being so, the answer to the third question in the verdict became immaterial. The verdict finding, as it did on sufficient evidence, that the place of employment was not as free from danger as the nature of the employment would reasonably permit, and that the plaintiff was injured because it was not made so, and that plaintiff was not guilty of contributory negligence, every fact essential to a recovery under the statute was found.

4. The defense of assumption of hazard was abolished by sub. 1 of sec. 2394—1 as to all employees. Were it still a defense, it might and probably would defeat recovery on the part of the plaintiff. But leaving out of consideration assumption of hazard, we think there is little evidence in the record which would warrant the jury in finding that the plaintiff was guilty of contributory negligence. Certainly the jury might find on the evidence, as it did, that there was no contributory negligence on his part.

5. The appellant attacks an instruction given by the court, but under the law as laid down in this opinion the instruction complained of could do the appellant no harm whether it was right or wrong.

*By the Court.*—Judgment affirmed.

TIMLIN, J. (*dissenting*). The rule of the statute law now is that the place shall be as free from danger to the lives, health, or safety of employees . . . as the nature of the employment will reasonably permit. I believe that this rule of statute law imposes upon the master a duty which he can only discharge by bringing the place of employment within its descriptive terms; but, properly understood, I think the

law is not drastic or severe. True, it changes the common-law obligation, which was only to exercise reasonable diligence in this respect, and modifies that rather savage rule which permitted the employer to conduct his business and arrange appliances in his own way and to put those whom want and hunger compelled to seek employment from him into as dangerous a place as he chose, provided the danger was open and obvious. *Osborne v. Lehigh Valley C. Co.* 97 Wis. 27, 71 N. W. 814. It is, however, nothing new for the law to lay down a rule of diligence which requires for its correct application the ascertainment of facts. It is no more difficult to prove that the place of employment was or was not as free from danger as the nature of the employment would permit than to prove that one's conduct equaled or fell short of that which an ordinarily prudent person would ordinarily do under the same or similar circumstances. Indeed the latter consideration, present in all negligence cases either as a question of law or question of fact, contains, when the evidence is undisputed, much more of the elements of fact than does the quoted rule of the statute. In the view I take of this case the undisputed evidence shows that the place was as free from danger as the nature of the employment would reasonably permit. A roof of this kind could not be covered except by fastening boards or plank across joists or rafters. The boards must be hauled up from below singly as laid or hauled up in quantity in advance of the laying and laid in piles ahead of the covering work. No permanent runway from the piles of lumber to those engaged in fastening down plank could be constructed because the situation was constantly changing as the covered portion progressed toward the remainder of the unused piles of plank. The nature of the work would not reasonably permit a permanent runway. In the light of afterthought only three possible variations from the method actually employed are suggested: (1) that the planks in the runway be nailed down; (2) that a balus-

trade or side railing be made along the runway; (3) that a double layer of planks might have been laid in the runway. The first I think would be unreasonable because of the constant change, and the nailed-down planks would have to be continually ripped up and would have been impaired for roof boards by the nail holes. The railing would have to be sawed off or otherwise shortened every time the carpenters advanced with their covering, and extended every time a pile of lumber was exhausted and it became necessary to move to another pile. There could be no doubling of the planks in the runway without at some stage of the work running short of enough plank to cover the roof or bringing up a surplus of plank for runways. The doubling of the planks would not be any safer to one who stepped a little farther outside of the supporting joist or rafter. These suggestions made in the majority opinion seem to me impractical and unreasonable, and I do not think that is the proper way to apply the statute. Almost every conceivable kind of work may be done in any one of several methods, and I think when it appears the place of work is being constantly changed by the authorized acts of the workmen engaged and for the purpose of carrying on the work and such workmen adopt a method usually and ordinarily safe, the place is as free from danger as the nature of the employment will reasonably permit. If the court or jury are allowed to speculate after the fact upon other possible modes of doing the work which might or might not have been safer and might have prevented the particular injury, but caused some other danger or some serious obstruction of the work, there is a lack of conformity to the statutory rule, because that rule only requires the place of work to be made as safe as the nature of the work will *reasonably* permit.

This case should be governed by *Lueckel v. Preston,* 154 Wis. 429, 143 N. W. 173, and it is distinguishable from *Sparrow v. Menasha P. Co.* 154 Wis. 459, 143 N. W. 317,

for the reason that in the latter case the place and manner of unloading were imminently dangerous. Logs were piled up on a flat car and the pile supported by side stakes. The employee was required to go along the side of the car and cut these stakes with an ax near the base so that the weight of the pile of logs would break the stake off and cause the logs to roll down over the side of the car at which the stakes were being cut and the employee was at work; the latter to get out of the way as best he could after the stakes were so far cut as to begin to break.

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PRIEBE, Administratrix, Appellant, vs. HIRSCH and another, Respondents.

*November 18—December 9, 1913.*

***Master and servant: Injury: Working place made unsafe by employee: Unauthorized assembling and use of appliances.***

**Where two employees, without the knowledge or consent of the employer and without any necessity therefor so far as the duties of either are concerned, of their own motion proceed to assemble and use an appliance which proves to be dangerous and inflicts an injury upon one of them, the employer is not liable for such injury on the ground that he has not performed his duty of furnishing a safe working place.**

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff, as administratrix, to recover damages for injuries to, and death of, her son, William Priebe. The facts out of which this cause of action arose are practically undisputed and are, briefly stated, as follows: The defendants, copartners, own and operate a foundry in the city of Milwaukee and are in the agricultural implement business. On May 2, 1912, the deceased, a

young man about twenty years of age, was one of their employees, and had charge of a steam engine in the foundry, did shop work, and looked after the cleaning and delivery of castings. In defendants' foundry there was a machine known as an emery stand, used for cleaning and grinding castings. The machine was operated by belt power, and need be described with no further details than that it consisted of an arbor with a rapidly revolving emery wheel at one end thereof for grinding castings, and a wire brush at the other for cleaning and polishing them. On the day in question the deceased had on hand a large quantity of plowshares to grind. William Hintz, a cousin of deceased, a young boy about eighteen years old, was also in the employ of defendants, and his duties were to assist in the shipping of agricultural implements, and he also, as he expressed it, acted as handy man to any one that needed assistance. Between 9 and 9:30 o'clock in the forenoon of said day Hintz was sent by one George Brenner, the shipping clerk, to inquire of deceased "whether or not that lot of plowpoints or plowshares had been completed." He did so, received a negative answer to this inquiry from deceased, and reported it to Brenner, who made no comment thereon and said nothing further to Hintz on the subject. However, before Hintz returned to Brenner he spoke to deceased and said that he would "lend him a hand or help him on that job around 1 o'clock." He thereupon, about 10 o'clock, proceeded to the warehouse in the three-story building of the defendants adjoining the foundry, walked up to the second story thereof and into the store room or stock room, where, on one side of such room, there was a pile of old, and on the other side a pile of new, emery stones, took an old one lying near the pile of new ones, brought it down to the foundry, and placed it on a shelf about ten feet from the emery wheel stand at which deceased was working. At about 1 o'clock he returned to the foundry, took the stone that he had previously laid

upon the shelf, held it while deceased removed the wire brush that was on one end of the arbor, and substituted the stone in place of it, the fitting and adjustment being done by deceased. The substitution of this emery stone for the wire brush being accomplished, they both proceeded to grind the plowshares. This work they did for about ten minutes, when the newly-added emery stone at which deceased was engaged broke, the flying parts thereof striking his body and fatally injuring him.

At the close of the evidence, on motion therefor the court directed the jury to find a verdict for the defendants, on the ground, as stated in his written opinion, in substance, that deceased was guilty of contributory negligence in that he disobeyed the orders or instructions of the defendants that whenever a change was to be made about the emery wheel stand he should apply to one of the defendants or the foreman. From a judgment entered on such directed verdict the plaintiff appealed.

For the appellant there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Walmsley.*

For the respondents there was a brief by *Harper & McMynn,* attorneys, and *Edgar L. Wood,* of counsel, and oral argument by *R. N. McMynn.*

VINJE, J. It seems the trial court held the plaintiff could not recover because the deceased was guilty of contributory negligence by violating the shop rule against making any change in any appliance or machine without the consent of Mr. Hirsch, one of his employers, or Mr. Jordan, the foreman. In the view the court takes of the case it is not necessary to pass upon the correctness of such ruling. The evidence shows that the deceased had provided for him by his employer an emery wheel and brush safe and adequate for his work; that the employer did not contemplate or authorize

the use of an additional one; that an additional one became necessary only by reason of Hintz volunteering to help the deceased. The employers did not know of such help being rendered and had no knowledge that another emery wheel was assembled and used. Neither does the evidence show that it was necessary that the deceased should be assisted in his work. We have, therefore, a situation where two employees, without the knowledge or consent of the employer, and without any necessity therefor so far as the duties of either are concerned, of their own motion proceed to assemble and use an appliance which proves to be dangerous and results in inflicting an injury upon one of them. Under such circumstances, is the employer liable on the ground that he has not performed his statutory duty of furnishing his employees with a safe place of employment? We think not. The danger was not created by the master, either directly or indirectly, for the employees were not acting within the scope of their employment when assembling and using the appliance. There was nothing in the duties of either that required or contemplated that such action should be taken on their part. Nor could the employer reasonably anticipate such action. The law wisely imposes upon the employer the duty to furnish a safe place of employment, but it does not hold him responsible for the unauthorized acts of employees who fail to furnish themselves a safe place when their duties do not require them to furnish it at all. Had the deceased remained at the place selected for him by his employer he would have been unharmed. He was injured because he and Hintz, who volunteered to help him, made a new place of employment and failed to make it safe, whether negligently or not is immaterial. Such new place having been made by the employees without the knowledge or consent of the employer, and without any necessity therefor arising out of the duties imposed upon them, he cannot be held liable for the unsafe condition thus created by them.

*Goff v. C. R. & M. R. Co.* 86 Wis. 237, 56 N. W. 465; *Charron v. Northwestern F. Co.* 149 Wis. 240, 134 N. W. 1048. The duty of the employer of furnishing a safe place does not extend to places needlessly chosen by employees without his knowledge, but is limited to places which it is his duty either directly or by necessary implication to furnish.

An employer's duty to furnish a safe place of employment is met when he furnishes a place which is safe provided the employment is carried on as the employer directs, or as an ordinarily prudent person may reasonably anticipate it may be carried on by the employee. He is not bound to furnish a place that shall be safe in any event, no matter how the employee does his work. *Montevilla v. Northern F. Co.* 153 Wis. 292, 141 N. W. 279.

*By the Court.*—Judgment affirmed.

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DALBERG, Appellant, vs. JUNG BREWING COMPANY, Respondent.

*November 18—December 9, 1913.*

*Contracts: Services of real-estate broker: Agency: Evidence: Instructions to jury: Staleness of demand: Appeal: Harmless errors.*

1. In an action to recover for services in procuring an option for a lease, alleged to have been rendered under a contract made by an agent on defendant's behalf, testimony of defendant's officers that the agent had never been given express authority to make such contracts was properly admitted.
2. It being admitted in the complaint that plaintiff had sued another person for a certain part of the services for which this action was brought, the bill of particulars in such other action was of no moment in this action, and was properly excluded when offered in evidence by plaintiff.
3. Where an action was not brought until almost six years after

the alleged services were rendered for which recovery was sought, and there was a sharp conflict in the testimony as to whether a cause of action ever existed, it was proper to charge the jury that they might take into consideration the delay in bringing suit.

4. Where, in an action to recover for services, the jury by a general verdict found that no valid contract to pay for such services was made by or on behalf of defendant, the error, if any, in excluding from the jury's consideration the claim for a certain part of the services which had originally been rendered to another person, but for which plaintiff alleged the defendant agreed to pay, was not prejudicial.

APPEAL from a judgment of the circuit court for Milwaukee county: OREEN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action to recover $1,200 for services claimed to have been rendered in the year 1903 in procuring an option for a lease of a store building for saloon and restaurant purposes on Third street in the city of Milwaukee. Plaintiff alleges that the greater part of the services, amounting to $900 in value, were originally performed at the request of one A. C. Feise alone, but that after their performance the defendant became interested in the matter with the consent of Feise, and agreed that it would pay plaintiff for the services which he had already rendered for Feise, and the reasonable value of such further services as the plaintiff might render in the matter if he would procure the option for its benefit. The plaintiff claims that he secured an oral option for defendant's benefit and that defendant received the lease in pursuance of the option and occupied the premises. Plaintiff admits that before the commencement of this action he sued Feise for the services rendered for him in the matter, but claims that he did so at defendant's request. The Feise suit never came to trial, but was abated by the death of Feise. This action was commenced in October, 1909. The defendant admitted that it obtained a lease of the building, but denied that it was obtained through the efforts of the plaintiff, and denied making any agreement to

pay the plaintiff for services in obtaining the lease. Upon the trial the court withdrew from the consideration of the jury the claim for $900 for the services originally rendered to Feise and submitted to the jury only the claim for $300 for services rendered to the defendant alone. A verdict for the defendant was rendered, and from judgment thereon the plaintiff appeals.

*S. W. Dalberg,* appellant, *in pro. per.*

*Henry J. Killilea,* for the respondent.

WINSLOW, C. J. Four assignments of error are made, which will be briefly treated.

1. The plaintiff claimed that one Meyer, an employee of the defendant, whose business was the collection of bills in the city and the reporting of any matters of interest to the defendant's business which he found in the course of his duties, made the contract set forth in the complaint. The plaintiff produced no testimony to show that Meyer had express authority to make any such contract and very little testimony tending to show that he had assumed to act for the defendant in such matters before. On the defense the testimony of certain of defendant's officers was offered and received against objection, to the effect that Meyer had never been clothed with express authority to make such contracts. The receipt of this testimony is assigned as error, but we find none. The plaintiff's whole case depended on the fact of Meyer's agency, and it was competent for the defendant to show if it could that there was neither express nor implied agency.

2. The defendant offered in evidence the complaint in the previous action brought by the plaintiff against Feise to recover $900 for the services alleged to have been rendered before the defendant became interested in the matter. This was received without objection. Thereupon the plaintiff offered in evidence a so-called bill of particulars which he

served in that action at the request of the defendant therein, but the same was ruled out, and this ruling is now complained of. We find no error here. Neither the complaint nor the bill were matters of any moment. The plaintiff in his complaint in the present action admitted that he had sued Feise for the $900. The fact was before the jury all through the trial of the present case, and the precise form in which the alleged $900 worth of services was alleged or described in the complaint or bill of particulars in the Feise suit cuts no figure in the present case.

3. In the course of his charge to the jury the trial judge said:

"In determining whether or not Meyer made the contract with the plaintiff as claimed by the plaintiff, you will take into consideration the interest or lack of interest which the plaintiff or Meyer has in the outcome of this lawsuit. You may also take into consideration the length of time which elapsed before suit was brought by the plaintiff against the defendant and all the other facts and circumstances shown by the evidence which will throw any light upon this matter."

This instruction is complained of because the court told the jury that they might consider the length of time which elapsed before the action was brought. We find no error here. The action was not brought until almost six years after the alleged services were rendered. The staleness of a demand is not a bar unless the statute of limitations has run upon it. Nevertheless, the fact that nearly six years have been allowed to pass before an action is brought is a fact which may properly be considered in a case where there is a sharp conflict in the testimony on the question whether a cause of action ever existed. The significance of the long delay will depend largely on the surrounding circumstances and the facts existing which may tend to explain or excuse it.

4. It is alleged that it was error to withdraw from the jury consideration of the claim for the services originally

rendered to Feise, amounting as claimed to $900. We suppose that the trial court withdrew this claim because he thought that the defendant's promise, if made at all, was an oral promise to pay the debt of another, and hence void under the statute of frauds. We do not find it necessary to decide whether the court was right in this ruling or not. There might perhaps be some doubt about it. The general verdict for the defendant, however, renders it certain that the ruling, if erroneous, was not prejudicial.

By their general verdict the jury found either that no contract at all was made, or that Meyer had no authority to make the alleged contract. In either event there could be no recovery of the $900 claim. This verdict was reached without prejudicial error so far as the $300 claim is concerned. If no contract for the $300 worth of services was made, none was made for the $900 worth of previous services.

*By the Court.*—Judgment affirmed.

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DREBLOW, Respondent, vs. ALBERT and another, Appellants.

*November 19—December 9, 1913.*

*Trial: Special verdict: Deficiencies supplied by judgment: Appeal: Printed case: Evidence: Illegal arrest: Malicious prosecution: Milk inspectors.*

1. Where no questions are proposed for a special verdict other than those submitted, if there is anything lacking in the verdict it must, under sec. 2858*m*, Stats., be considered as supplied by the judgment.
2. The printed case on appeal should contain so much of the evidence as is necessary for the proper consideration of the assignments of error.
3. In an action for false and malicious arrest without legal process and for malicious prosecution, evidence showing, among other things, that plaintiff, a milk dealer, not recognizing defendant as a milk inspector, refused at first to give him a bottle of

**milk, but upon being convinced of his official character offered to let him take the milk; that thereafter defendant arrested him without a warrant for such first refusal; and that, although the subsequent issue of a warrant was advised by an assistant city attorney, defendant did not fully and fairly state the case to such attorney, was sufficient to warrant a verdict and judgment for plaintiff.**

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The cause was submitted for the appellants on the brief of *Ernst von Briesen,* attorney, and *John Sander,* of counsel, and for the respondent on that of *David E. Johnson.*

TIMLIN, J. Two causes of action were stated in the complaint: one for false and malicious arrest without legal process, and another for malicious prosecution. The jury returned a special verdict upon which the court rendered judgment in favor of the respondent and against the appellants *Albert* and *Krause,* who made the arrest, for $35, and in favor of the respondent and against the appellant *Albert* for $210. No questions were proposed for the special verdict other than those submitted. Consequently, if there is anything lacking in the verdict it must be considered supplied by the judgment in favor of the plaintiff. Sec. 2858*m,* Stats.

The first error assigned by appellants is that of denying their motion for a directed verdict; the second in denying a motion for judgment *non obstante;* and third in denying a motion for a new trial; and fourth, in granting judgment in favor of the plaintiff upon the verdict. The appellants, however, while printing the pleadings and their motion papers at length, have failed to print the evidence except portions of that of the appellant *Albert* and that of City Attorney McIntyre and a very small portion of that of *Krause.* How they expect us to review the assignments of error of the nature stated without printing the evidence is not very ap-

parent. We have looked into the record sufficiently to ascertain that there was evidence of an arrest without process, considerable detention and restraint of liberty, and a warrant thereafter issued and another arrest made upon a charge of refusing to give a sample of milk to the defendant *Albert,* who is a milk inspector, and the discharge and termination of this prosecution. The plaintiff, not recognizing *Albert* as a milk inspector, refused to give the latter a bottle of milk, and upon being informed by *Albert* that the latter was a milk inspector the plaintiff asked him to disclose his button or star which the ordinance required him to wear. *Albert* showed this insignia of his office and the plaintiff offered him the milk, but thereafter *Albert* called *Krause* to his aid and arrested plaintiff without warrant for his first or preliminary refusal, although the plaintiff had, upon being convinced of his official character prior to the arrest, offered to let him take the milk. This was evidence to the effect that the arrest was quite arbitrary, officious, and unnecessary. It was illegal because without process, and taking the whole transaction together no offense was committed. There was further evidence that although the subsequent issue of the warrant was advised by one of the assistant city attorneys, the defendant *Albert* did not fully and fairly state the case to this attorney. The verdict of the jury and the judgment of the court therefore settle the case against the appellants and we are unable to give them relief without in effect trying the case over in this court. This we are not permitted to do.

*By the Court.*—Judgment affirmed.

MOERING, Appellant, vs. FALK COMPANY, Respondent.

*November 19—December 9, 1913.*

***Master and servant: Injury from incompetency of fellow-servant: "Habitual" carelessness: Special verdict: Evidence: Constructive notice.***

1. **The word "habitual" is ordinarily applied to those things which we do customarily or from force of habit.**
2. **A servant may be incompetent because of carelessness, although not *habitually* careless.**
3. **In an action for personal injuries alleged to have been caused by incompetency of a fellow-servant, the evidence showed that the fellow-servant was either habitually careless or was guilty of an occasional fugitive act of carelessness which, in this case, would not show incompetency. The court submitted for special verdict the question whether he was "an incompetent employee of defendant because of any habitual carelessness" in doing his work, and attention was not at any stage of the proceedings below specifically called to such use of the word "habitual." *Held*, that its inclusion in the question was not improper or prejudicial to plaintiff.**
4. **A servant cannot be held incompetent merely because he does what all of his numerous fellow-servants do who are engaged in the same work. So *held*, where the act resulting in plaintiff's injury was the sprinkling of gasoline upon burning gasoline in the process of drying the molds in a foundry.**
5. **Where there was a shop rule prohibiting the doing of the act which resulted in plaintiff's injury, and the employees had been repeatedly warned not to do their work in that way and sharply reprimanded for disobeying the rule, and it appeared that they were careful not to violate the rule when any of defendant's officers or agents or vice-principals were around, evidence of a few fugitive violations by one employee during a long period of time did not warrant a finding that defendant had, by reason thereof, constructive notice of the incompetency of such employee.**

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

For the respondent there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

BARNES, J. This case was before this court on a former appeal from a judgment entered on a directed verdict in defendant's favor. The judgment was reversed because it was thought the evidence presented a jury question. The case is reported in volume 141 of our Reports, page 294 (124 N. W. 402), and reference is made thereto for a statement of the nature of the case. On a subsequent trial the jury returned a verdict in defendant's favor, and from a judgment entered thereon plaintiff again appeals.

The first question in the special verdict was as follows:

"(1) Was the molder, Loesch, an incompetent employee of the defendant because of any habitual carelessness in the sprinkling of gasoline upon burning gasoline in molds?"

The jury answered "No." The plaintiff appeals from a judgment entered on this verdict, on the ground that it was error to use the word *"habitual"* in the question.

The plaintiff asked that the following question be submitted to the jury: "Was the molder Loesch an incompetent servant of the defendant?" The court refused to submit the question, and exception was taken to such refusal.

There was no claim made that Loesch was not capable of doing his work properly. If he was incompetent, it was because he was careless.

A servant may be incompetent because of carelessness and still not be habitually careless. The word "habitual" is ordinarily applied to those things which we do customarily or from force of habit. If an employee is called upon to perform a certain act, say fifty times a day, and does it properly forty times and negligently ten times, it would not be accurate to say that the act was habitually done in a careless way, because it was not customarily so done. Under such circumstances, however, the servant might well be incompe-

tent. So cases might well arise where it would be improper to submit such a question as was here submitted.

But we do not think that the plaintiff was prejudiced in the slightest degree by the inclusion of the word "habitual" in the question, or that its inclusion was improper in this case. It is apparent that the reason for asking that a different question be submitted was not because of the use of the word "habitual." The plaintiff's evidence tended to show *"habitual"* carelessness. His counsel requested the court to take the question submitted from the consideration of the jury and answer it in the affirmative on the uncontradicted evidence. The attention of the lower court does not appear to have been specifically called to the use of the word at any stage of the proceedings. The opinion of the trial court on the motion denying a new trial states that the principal ground urged in support of the motion was that the verdict was perverse.

The evidence wholly fails to show how frequently Loesch used gasoline for drying molds. As far as it goes, it is to the effect that its use was infrequent. Staege, another molder who worked within a few feet of him for six months, said he never saw him use it during that time. The plaintiff worked with Loesch for five weeks as helper before he was burned, and said he never saw him use gasoline before the day of the injury. There is no evidence that shows or tends to show how frequently it was necessary to make a second application of gasoline. There is no evidence in the case which shows or tends to show that Loesch ever used a second application of gasoline when he did not throw it on burning gasoline. The two principal witnesses for the plaintiff testified that Loesch had in fact thrown gasoline on burning gasoline from fifteen to twenty-five times. They do not state, nor does any other witness, that he ever did the work otherwise.

It is apparent that the jury did not believe the testimony of these two witnesses. By the charge and by reason of the

submission of the first question, the jury were given to understand that there was sufficient evidence in the case to warrant an affirmative answer. On the state of the evidence Loesch was either habitually careless or he was guilty of an occasional fugitive act of carelessness, which in this case would not show incompetency. It is in evidence and undisputed that all of the molders, and there were from sixty to one hundred of them on the same floor with Loesch, occasionally sprinkled gasoline on burning gasoline. If Loesch did no more, he was not incompetent, unless all of his fellow-molders were incompetent also, and it is not correct to say that a servant is incompetent because he does what all of his numerous fellow-servants do who are engaged in the same work. These occasional lapses indicated simply that the employees, being human beings, were, like the great mass of mankind, careless at times. The question submitted was entirely appropriate, considering the nature of the evidence offered. That on the part of the plaintiff tended to show habitual carelessness, while that offered by the defendant tended to dispute this and to show no carelessness whatever.

There is another reason why plaintiff could not make out a case by showing that Loesch was guilty of a few acts of carelessness covering the year and a half he worked as a molder before the accident. We do not think there is any evidence in the case that would warrant a finding of actual knowledge on defendant's part that Loesch was incompetent. There was a rule of the shop, well known to the various employees, prohibiting the doing of the act which resulted in plaintiff's injury. The molders, including Loesch, were repeatedly warned not to do their work in that way and were sharply reprimanded for disobeying the rule. It was testified to, and the evidence was uncontradicted, that the molders were careful not to violate the rule when any of the defendant's officers or agents or vice-principals were around. Where such a condition prevailed, it would take something more than a few fugitive acts covering a long period of time

to warrant a jury in finding constructive notice, and it was essential to the plaintiff's case that constructive notice be found. We think on the evidence before the court the question of the incompetency of Loesch was fairly submitted.

*By the Court.*—Judgment affirmed.

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FRIEDRICH, Executor, and others, Appellants, vs. HUTH, Respondent.

*November 20—December 9, 1913.*

*Joint tenancy: Deed to husband and wife: Survivorship: Trusts and trustees: Resulting trusts, when created: Wife's property in possession of husband: Accounting: Repairs to joint estate.*

1. Where real property was conveyed to husband and wife as a part of the wife's share of her mother's estate, by a brother who had held it in trust for the mother during her lifetime, the title vested in such grantees as joint tenants, in the absence of fraud or mistake, and the wife having died before the husband he took the whole as survivor.
2. In such case no resulting trust was created in favor of the wife or her heirs by reason of her having paid the consideration, such trusts having been abolished by secs. 2071, 2077, Stats.
3. No rights of creditors being involved, and the wife having had full knowledge of the form of the conveyance at the time it was executed and having made no objection thereto, no trust would result in such case by virtue of either sec. 2078 or sec. 2079, Stats.
4. The rule that where a husband acquires possession of the separate property of his wife he is deemed to hold it in trust for her in the absence of evidence that she intended to make a gift of it to him, has a very general application as regards personal property, but trusts in real estate are covered by the statute.
5. Where land for which a married woman furnished the consideration was with her consent conveyed to herself and her husband jointly, and upon her death he succeeded to the entire title, he was not entitled to credit for repairs and improvements made on the land, as against his liability to account for personal property held by him in trust for her.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Modified and affirmed.*

This is an action in equity brought by the executor and the devisees and legatees under the last will of Johanna Huth, deceased, to recover of the defendant (the husband of the deceased) certain moneys and real estate received by the defendant from his deceased wife during her lifetime.

It appeared without substantial dispute that the defendant had received in moneys from his wife in various ways $3,815.46. It did not appear affirmatively that any part of this money had at any time been transferred by the wife to her husband with intent to make a gift thereof. It also appeared that there was conveyed to the defendant and his deceased wife, by deed, two certain lots in Milwaukee, which were in fact a part of the wife's share in the estate of her deceased mother, the title of which had been held by a brother of the testatrix in trust for the mother during her lifetime, that the deed of said lots ran to the defendant and his said wife as grantees, and that the title remained in the same condition at the time of the death of the wife; also that the defendant had spent $800 for repairs upon the real estate and $125.46 for the funeral expenses of the deceased wife.

Upon these facts the trial court held that the defendant had received the aforesaid sum of $3,815.46 in trust for his said wife; that the amounts spent by him for repairs and funeral expenses, aggregating $925.46, should be credited thereon, leaving $2,890 still due from the defendant to the executor, *Friedrich;* that by the conveyance of the two lots the title was placed in the defendant and the deceased as joint tenants, and that this title could not be affected but must remain as it was placed by the legal import of the deed.

Judgment that the plaintiffs recover the $2,890, and that the same be paid to the executor and that the plaintiffs be denied all further relief, was entered, and the plaintiffs appeal.

For the appellants there was a brief by *Friedrich, Teall & Hackbarth,* attorneys, and *Paul D. Carpenter,* of counsel, and oral argument by *Mr. Carpenter.*

*F. J. Knoell,* for the respondent.

WINSLOW, C. J. The appellants' principal contention is that the court should have held that the real estate belonged to the testatrix or was held in trust for her. We are satisfied that this contention is not well founded. It is well settled in this state that where lands are deeded to husband and wife a joint tenancy is thereby created, and that the right of survivorship exists in such case as at common law, which cannot be defeated by devise of the property made by the joint tenant who first dies. *Bassler v. Rewodlinski,* 130 Wis. 26, 109 N. W. 1032. It is also very well established that, in the absence of fraud or mistake, the execution and delivery of a deed of real estate with the intention of carrying the title vests the title at once in the grantee named in the deed. *Rogers v. Rogers,* 53 Wis. 36, 10 N. W. 2.

In the present case it appeared without dispute that when the deed of the real estate in question was executed and delivered the deceased was present and knew that her husband and herself were named as grantees therein, and either expressly or tacitly consented to that arrangement. There was no fraud or mistake of fact. The title therefore passed according to the legal import of the deed to the husband and wife as joint tenants.

It was a principle of the common law that when land is purchased in the name of one person but the consideration is paid by another, a trust called a resulting trust is created in favor of the person paying the consideration. But such trusts have been abolished in this state, not simply by sec. 2071, Stats. 1911, which declares that all trusts except as authorized and modified by ch. 96 of the Statutes are abolished, but by the specific provisions of sec. 2077, which declares that in such case no trust shall result.

This statute has been expressly held to apply to a case where the wife furnished one half of the purchase money of a farm and was present when the deed thereof was made direct to her husband, but made no objection to the conveyance being so made, although it appeared that she believed that her husband would hold the title in trust for her. *Skinner v. James,* 69 Wis. 605, 35 N. W. 37. The case cited seems exactly parallel in principle to the present. In that case the wife had a separate estate, consisting of money, and consented that it be used in purchasing real estate with the title in her husband's name. Here the wife had a separate estate composed of land, the legal title thereof being in her brother. She consented that the land be conveyed to herself and husband as joint tenants. The consideration was paid by the wife as truly in the latter case as in the first. See, also, *Campbell v. Campbell,* 70 Wis. 311, 35 N. W. 743; *Martin v. Remington,* 100 Wis. 540, 76 N. W. 614.

It is true that by sec. 2078 a trust in such lands may still result in favor of creditors of the person paying the consideration, and it is also true that by sec. 2079 it is expressly provided that sec. 2077 shall not apply where the alienee named in the deed has taken an absolute deed without the knowledge of the person paying the consideration, or where in violation of a trust he has purchased the lands with the moneys of another.

The first of the two sections last named simply preserves the rights of creditors, and there are no creditors here. The second preserves intact a certain class of those trusts arising out of attempted fraud, which were known as constructive trusts at common law, or trusts *ex maleficio,* and which exist when one person procures land to be deeded to himself without the knowledge or consent of the person who furnishes the purchase money, or in violation of a trust owing to that person. Such was the situation in the case of *Fawcett v. Fawcett,* 85 Wis. 332, 55 N. W. 405. It is plain that neither of these sections has any bearing on the present case. The

plaintiff invokes the well understood rule that where a husband acquires possession of the separate property of his wife he is deemed to hold it in trust for her benefit in the absence of evidence that she intended to make a gift of it to him. No court has laid down this principle more definitely than this court. *Harter v. Holman,* 152 Wis. 463, 139 N. W. 1128. As applied to personal property it has a very general application, but trusts in real estate are of course all subject to the provisions of the statute which have just been noted, and which are entirely inconsistent with the existence of any trust in the present case. Trusts in personalty may be created by parol and are not affected by the statute of uses and trusts. *Dewey v. Fleischer,* 129 Wis. 591, 109 N. W. 525; 1 Perry, Trusts (6th ed.) § 86; *Lamberton v. Pereles,* 87 Wis. 449, 58 N. W. 776.

The appellants' second contention is that, if the title of the real estate in question is adjudged to remain as conveyed, the trial court should not have credited the husband the sum of $800, which he expended for repairs and improvements on his own real estate. We see no flaw in the reasoning on this proposition. The correctness of the contention seems obvious.

The judgment must be modified by adding to the money recovery the sum of $800, as of the date of the judgment, and as so modified affirmed, with costs to the appellants.

*By the Court.*—It is so ordered.

# HORLICK'S MALTED MILK COMPANY, Appellant, vs. A. SPIEGEL COMPANY and others, Respondents. SAME, Respondent, vs. SAME, Appellants.

*November 20—December 9, 1913.*

*Discovery: Examination of party before issue joined: Nature and scope: Unfair trade: Reports of agents and employees: Disclosure of names of witnesses: Formula of food product: Production of physical objects: Privileged communications: Attorney and client: Unreasonable searches and seizures: Constitutional law: Discretion of trial court: Appeal: What orders appealable.*

1. An examination under sec. 4096, Stats., is in the nature of a cross-examination. The statute has been amended from time to time so as to accomplish full disclosure and should be liberally construed to that end.
2. The examination of a corporate officer under the statute, after complaint served but before answer, is subject to the same rules as that of any other witness, the only restriction being that he cannot be compelled to disclose anything not relevant to the controversy.
3. The examination is very largely in the discretion of the trial court, and its order made in proceedings under the statute will not be disturbed on appeal except for clear abuse of such discretion.
4. In an equitable action to restrain defendant from selling a spurious article as and for a product manufactured by plaintiff corporation, an officer who verified the complaint, in which the making of deceptive sales was averred on information and belief, may properly be required, in an examination under said sec. 4096, to disclose the contents of reports made to him concerning such sales, by employees and agents of the corporation, which formed the basis of the allegations of the complaint.
5. Reports made by employees and agents of a corporation to a superior officer for the purpose of enabling the corporation to bring or prosecute an action, are not privileged.
6. The privilege existing between attorney and client is confined strictly within the limits of the statute (sec. 4076, Stats.) and extends only to communications made by the client to his attorney and the advice given thereon by the latter in the course of his professional employment.
7. In an action for unfair trade, questions asked of a corporate officer who verified the complaint, upon his examination under

sec. 4096, as to the names and addresses of persons making reports to the corporation upon which he based his belief of the truth of the complaint, and whether such reports were in writing or by parol, did not call for the disclosure of trade secrets, nor did they constitute an unreasonable search or seizure under secs. 11, 22, art. I, Const. of Wis., or under the Fourth amendment, or sec. 1 of the Fourteenth amendment, to the federal constitution.

8. Where it is not clear that evidence called for under sec. 4096 is within the knowledge of the party calling for it, the discretion of the trial court in requiring the questions to be answered will not be interfered with.

9. Where a complaint for unfair trade charges substitution of a spurious article for a food product manufactured by plaintiff, the ingredients of plaintiff's product involve a vital issue in the case, and questions on that subject are therefore relevant and proper.

10. It was also proper upon such examination to direct the witness to produce certain bottles and their contents from which the alleged substitution was made, which had been in defendant's store but which had been delivered before the action to an agent of the plaintiff.

11. Under the provision of sec. 4096, Stats., that a party may be required to produce upon his examination "all books, papers, files, records, things, and matters," etc., the production of any article, though of a physical character, which is relevant to the controversy may be compelled.

12. Although an examination under sec. 4096 is a substitute for the old bill of discovery, the statute goes further than the bill of discovery and an examination under it is not governed nor limited by the rules in chancery.

13. An order directing that a party need not answer certain questions asked of him on his examination under sec. 4096, Stats., is not appealable.

APPEALS from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed on plaintiff's appeal; defendants' appeal dismissed.*

The plaintiff commenced an action against the defendants by service of summons and complaint. The complaint alleges that the plaintiff and defendant *A. Spiegel Company* are Wisconsin corporations, and further alleges:

"3. On information and belief, that defendant *Adolph Spiegel* is and at all the times hereinafter mentioned has been

the president of defendant *A. Spiegel Company* and in active charge and direction of its business, and that he ordered, directed, assisted, confederated, and connived in and about and at the acts hereinafter set forth on the part of the defendant *A. Spiegel Company* and was an active participant therein.

"4. On information and belief that defendant *Robert Kiefer* is and at all times hereinafter mentioned has been an employee of defendant *A. Spiegel Company,* to wit, the manager of the Grand Avenue store thereof; that by and with the advice and at the direction and suggestion of defendant *Adolph Spiegel* said defendant ordered, directed, assisted, confederated, and connived in and about and at the acts hereinafter set forth on the part of the defendant *A. Spiegel Company* and was an active participant therein.

"5. That for upwards of ten years last past plaintiff has manufactured in its factory located near the city of Racine, Wisconsin, and sold throughout the city of Milwaukee, in the state of Wisconsin, a food product under the name of Horlick's Malted Milk, and has continuously sold said product under the name of Horlick's Malted Milk and has labeled each package containing said product with said name, and said product has come to be widely known throughout the said city of Milwaukee by both dealers and retailers of such substances and by the consumers thereof as being the product of plaintiff's factory. That plaintiff company is the only company manufacturing said product and selling the same under the name of Horlick's Malted Milk in the state of Wisconsin or in the United States.

"6. Plaintiff further shows that on the 8th day of December, 1903, it duly filed for record in the office of the secretary of the state of Wisconsin and with the register of deeds of the county of Racine, in said state, said county being the county in which plaintiff at said time had its principal place of business, a written statement adopting a label or trademark as follows, to wit: *'HORLICK' 'In All Forms, Combinations and Colors.'* That said statement was duly verified as required by law and was duly published once a week for three successive weeks in a newspaper printed in the English language and of general circulation in said Racine county, and due proof of publication thereof as provided by law was filed in the office of said register of deeds of said county of Racine.

"7. Plaintiff further shows that for more than ten years last past it has sold and marketed its said product under its said name in said city of Milwaukee by means of signs and dispensing jars, which have been given to druggists throughout the city of Milwaukee, state of Wisconsin, United States of America, and elsewhere, and which have been by them prominently displayed in their said drug stores, and particularly in connection with the operation of soda fountains, and which said signs and dispensing jars have borne prominent labels bearing the words, 'Horlick's Malted Milk' and the word 'Horlick's;' and that said words have become generally known to said druggists and their customers throughout said city of Milwaukee as referring to and identifying plaintiff's said product. That said dispensing jars are of a peculiar and distinctive shape and style and bore and bear prominent labels in blue containing the words 'Horlick's Malted Milk' and have blown in the glass the work 'Horlick's' and were and are by numbers of druggists in said city of Milwaukee prominently displayed upon soda fountains and were and are used by them for serving plaintiff's malted milk at their said soda fountains.

"8. That for some time prior to the commencement of this action, the exact length of which plaintiff is unable to state, but alleges on information and belief that said time is at least two years, defendant *A. Spiegel Company* had been operating a drug store in said city of Milwaukee at the corner of Grand avenue and West Water street, and has been operating a branch store in said city at No. 414 National avenue. That at each of said places it had and has a soda fountain, and has and had prominently displayed therein dispensing jars and signs furnished by plaintiff and bearing the label 'Horlick's Malted Milk,' and has and had a flourishing trade in the sale of malted milk at its said soda fountains.

"9. Plaintiff further shows on information and belief that during said time last mentioned said defendant *A. Spiegel Company,* notwithstanding plaintiff's rights in the premises, and well knowing the same, has filled said dispensing jars and prominently displayed the same, and offered and exposed for sale in said jars a product or products other than the said product of plaintiff. That plaintiff is informed and believes that said products so offered and exposed for

sale are and were the products of competing manufacturers, to wit, Borden's Malted Milk, a product manufactured by Borden's Condensed Milk Company, a New Jersey corporation, and Thompson's Hemo Malted Milk, a product manufactured by Thompson's Malted Food Company, a Wisconsin corporation; and that said products and each of them were and are sold by said defendants, its agents, servants, and employees, placing said product and each of them in said dispensing jars labeled 'Horlick's Malted Milk' and selling the said products therefrom as and for the product of the plaintiff company. That said acts and each of them constitute a deception upon the customers and upon the public and a fraud upon the rights of the plaintiff company, and constitute a violation of its trade name hereinbefore set forth.

"10. Plaintiff further alleges on information and belief that defendant *A. Spiegel Company* has derived large profits through the sale by it in the said city of Milwaukee of a product or products other than plaintiff's said product and for plaintiff's said product under its said name, but that it cannot with certainty state the amount.

"11. On information and belief plaintiff further shows that said defendant *A. Spiegel Company* has threatened and given out and stated that it will continue so to sell products other than plaintiff's product as and for plaintiff's said product under its said name."

The prayer is that defendants, their officers and agents be restrained from placing, selling, offering, or exposing for sale any product other than plaintiff's said product in any dispensing jar labeled "Horlick's Malted Milk," or from selling, offering, or exposing for sale any product other than plaintiff's said product as and for plaintiff's said product; and that the defendants account for and pay over to the plaintiff all profits realized by them or any of them upon sales of said products other than plaintiff's said product sold by them as and for plaintiff's said product under its name in said city of Milwaukee.

The complaint was verified upon information and belief by A. J. Horlick, vice-president of plaintiff, and said Hor-

lick was examined under sec. 4096, Stats., before a court commissioner of Milwaukee county after service of the complaint and before answer. The commissioner ordered the witness to answer several questions and upon refusal ordered him committed for contempt. On review in the circuit court the court ordered several of the questions answered and held that others need not be answered, and made an order punishing the witness for contempt for refusal to answer the questions ordered answered. Both parties appealed from the order.

For the plaintiff there was a brief by *Lines, Spooner, Ellis & Quarles,* and oral argument by *Louis Quarles* and *George Lines.* They contended, *inter alia,* that, a party examined under the statute being subject to the same rules as other witnesses and obliged to disclose only matters relevant to the controversy, the examination must be confined to matters within his personal knowledge. *Richards v. Allis,* 82 Wis. 509, 514, 52 N. W. 593; *Kelly v. C. & N. W. R. Co.* 60 Wis. 480, 19 N. W. 521. Reports from agents are not in themselves evidence or relevant. Jones, Ev. (2d ed.) § 345; *La Abra S. M. Co. v. U. S.* 175 U. S. 423, 499, 20 Sup. Ct. 168; *Vicksburg & M. R. Co. v. O'Brien,* 119 U. S. 99, 7 Sup. Ct. 172; *San Antonio & A. P. R. Co. v. Manning,* 20 Tex. Civ. App. 504, 50 S. W. 177; *Ins. Co. of N. A. v. Guardiola,* 129 U. S. 642, 9 Sup. Ct. 425; *North Hudson Co. R. Co. v. May.* 48 N. J. Law, 401, 5 Atl. 276; *Chicago & N. W. R. Co. v. Fillmore,* 57 Ill. 265; *Atchison, T. & S. F. R. Co. v. Burks,* 78 Kan. 515, 96 Pac. 950; *Powell v. N. P. R. Co.* 46 Minn. 249, 48 N. W. 907; *Brady v. North Jersey St. R. Co.* 76 N. J. Law, 744, 71 Atl. 238. Such reports are not admissions. *Ex parte Schoepf,* 74 Ohio St. 1, 77 N. E. 276; *Carroll v. E. T., V. & G. R. Co.* 82 Ga. 452, 10 S. E. 163. They were privileged. *Koeber v. Somers,* 108 Wis. 497, 84 N. W. 991; *Herman v. Schlesinger,* 114 Wis. 382, 90 N. W. 460; *Dudley v. Beck,* 3 Wis. 246; *Cully v. N. P. R. Co.* 35 Wash. 241, 77 Pac. 202; 6 Ency.

Pl. & Pr. 750; *Wheeler v. Le Marchant,* L. R. 17 Ch. Div. 675; *Davenport Co. v. P. R. Co.* 166 Pa. St. 480, 31 Atl. 245; *Dampman v. P. R. Co.* 166 Pa. St. 520, 31 Atl. 244; *Spinney v. Boston E. R. Co.* 188 Mass. 30, 73 N. E. 1021. A party cannot be compelled to disclose the names of his witnesses. *Phipps v. Wis. Cent. R. Co.* 130 Wis. 279, 110 N. W. 207; *Wabash & W. R. Co. v. Morgan,* 132 Ind. 430, 31 N. E. 662, 32 N. E. 85; *Collins v. C. & N. W. R. Co.* 150 Wis. 305, 136 N. W. 628; *Robbins v. Brockton St. R. Co.* 180 Mass. 51, 61 N. E. 265; 4 Wigmore, Ev. § 2484. Every individual is entitled to protection in his private documents, books, and papers and to immunity against unreasonable searches and seizures. *Hale v. Henkel,* 201 U. S. 43, 26 Sup. Ct. 370; *Ex parte Brown,* 72 Mo. 83; *Shaftesbury v. Arrowsmith,* 4 Ves. Jr. 66; *Lee v. Angas,* L. R. 2 Eq. 59; *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900.

For the defendants there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *W. L. Gold.*

KERWIN, J. On the plaintiff's appeal it is contended that the court below was in error in ordering the witness to answer certain questions and in ordering him committed for contempt in refusing to do so. As appears from the complaint, the action was brought for what is known as unfair trade, the plaintiff claiming in its complaint that the defendant was selling products, not the product of the plaintiff, as and for the plaintiff's product. The first group of questions under consideration are those relating to reports of sales. The plaintiff claimed the defendant made sales of products other than plaintiff's and represented them to be the plaintiff's product. These questions are numbered in plaintiff's brief and the printed case as follows: 378, 381, 382, 384, 385, 386, 387, 389, 395, 396, 397, 405, 406, 413, 415, 416, 424, 456, 457, 460, 482, 483, 507, 511, 512, and 517.

It developed during the examination that the plaintiff ob-

tained its alleged information upon which it made and verified its complaint from reports made through its employees. That one Sugden, an employee of plaintiff, employed one Bates to go to defendant's store and procure a bottle and contents represented to contain plaintiff's product. Counsel for defendants then sought to obtain the reports upon which the complaint was made and verified by a series of questions, hereinbefore set forth. Question No. 378 was as follows:

"Q. 378. Did you have any written reports from Bates and Sudgen (Sugden) or any other source as to the claimed substitution by the defendant *Spiegel Company* of some other malted milk for Horlick's Malted Milk at their soda fountains?"

Other questions pursued the same line of inquiry. The contention of plaintiff under this head is that the ruling of the court below requiring these questions to be answered was erroneous for the following reasons: "(a) The reports were not in themselves evidence nor relevant. (b) Reports of an agent to his principal are not admissions. (c) The reports were privileged. (d) Their production would constitute an unreasonable search and seizure. (e) The witness cannot be interrogated as to matters not within his knowledge."

Sub. 5 of sec. 4096, Stats., among other things, provides:

"But should the defendant desire an examination of the plaintiff, his or its agent, employee, or officer, before issue joined, said defendant shall be entitled to examine said plaintiff, agent, employee, or officer, on all points set out in the complaint, as though the same had been put in issue; but such examination shall not preclude the right to another examination after issue joined upon all the issues in the cause. . . ."

This court has held that an examination under sec. 4096 is in the nature of a cross-examination. The statute has been given a liberal construction by this court. From time to

time the legislature has amended it so as to accomplish full disclosure under it. The statute in its present form provides for examination before issue joined or any pleading served; for examination after complaint is served; and also for examination after issue joined.

In the instant case the examination was had after service of the complaint, hence the defendants were entitled "to examine said plaintiff, agent, employee, or officer, on all points set out in the complaint, as though the same had been put in issue." The statute also provides that the examination under sec. 4096 shall be subject to the same rules as that of any other witness, but that the witness shall not be compelled to disclose anything not relevant to the controversy. In the case at bar the examination was had under stipulation dispensing with notice and affidavit required by the statute in examinations before issue joined. It is therefore contended by counsel for plaintiff that the complaint stands alone as the basis of the examination, which must be confined to the points set out in it. Conceding this to be true for the purpose of this case, we still think that under the statute and the decisions of this court the examination is in the nature of a cross-examination. *Cleveland v. Burnham,* 60 Wis. 16, 21, 17 N. W. 126, 18 N. W. 190.

The examination of the witness in the instant case was subject to the same rules as that of any other witness, the only restriction being that he could not be compelled to disclose anything not relevant to the controversy. *Kelly v. C. & N. W. R. Co.* 60 Wis. 480, 19 N. W. 521; *Richards v. Allis,* 82 Wis. 509, 514, 52 N. W. 593.

The statute also provides (sub. 3):

"The attendance of the party to be examined, and the production of all papers, books, files, records, things, and matters in the possession of such party, his or its assignors, officers, agents, or employees, relevant to the controversy, may be compelled upon subpœna and the payment or tender of his fees as a witness."

Sec. 4097, Stats., provides for punishment for contempt in case of neglect or refusal to testify or to have on the examination any papers, books, files, records, things, or matters in his possession relevant to the controversy. The theory of the statute is to afford full discovery of all matters relevant to the controversy. *Schmidt v. Menasha W. W. Co.* 92 Wis. 529, 66 N. W. 695; *Hughes v. C., St. P., M. & O. R. Co.* 122 Wis. 258, 99 N. W. 897.

The examination is very largely in the discretion of the trial court, and the order of the court in proceedings under the statute can only be disturbed for clear abuse of such discretion. *American F. P. Co. v. American M. Co.* 151 Wis. 385, 138 N. W. 1123.

Proceeding to the specific objections of counsel for plaintiff under this head we shall consider them in the order stated.

(a) It is first insisted that the reports were not in themselves evidence nor relevant. In considering this objection it will be well to keep in mind the nature of the action. It may be regarded as an action based upon unfair trade. In all such actions brought in equity to restrain others from selling an article alleged to be an invasion of the plaintiff's rights, the plaintiff must come into court with clean hands. *Lemke v. Dietz,* 121 Wis. 102, 98 N. W. 936; *United States T. Co. v. McGreenery,* 144 Fed. 531; *Capewell H. N. Co. v. Putnam N. Co.* 140 Fed. 670.

The plaintiff must be able to maintain that the claim set up in its complaint was founded in truth and its commodity what it purported to be and that it was not itself deceiving the public. The question, also, whether the sales which plaintiff claims the defendants made were deceptive sales was relevant, and this, of course, makes relevant the question of how the sales were made, and whether there was in fact deception, how and to whom the sales were made, what the purchaser asked for, and what he was given.

The averment in the complaint that the sales were de-

ceptive is upon information and belief, and this averment is based upon reports. The reports are therefore relevant because they may show that the sales were not in fact deceptive or that they were deceptive. There are perhaps other reasons why the reports were relevant, but the foregoing are sufficient for the present. It is therefore clear that the reports were relevant to the inquiry. While they might not be competent to establish the truth of the facts therein stated, they were facts tending to show the basis of the plaintiff's claim as set up in its complaint and the ground of plaintiff's belief as to whether it had a cause of action or not. The cases cited by plaintiff under this head do not reach the question here. *La Abra S. M. Co. v. U. S.* 175 U. S. 423, 20 Sup. Ct. 168, holds that the admissions of agents do not always bind the principal. This is good law, but does not apply here. The question here is, Were such reports made, what were they, and did they form a basis for the action? Other cases are cited to the effect that reports or statements made under certain circumstances do not bind the principal and are not admissions. It developed on the examination in the case at bar that the complaint was made, verified, and the action begun on the strength of the reports which were sought to be obtained on the examination.

(b) The point made by counsel for plaintiff under this head to the effect that reports of an agent to his principal are not admissions is sufficiently answered by what has been heretofore said.

(c) It is urged under this head that the reports were privileged. This contention is based upon the ground that the reports called for were made by employees either to plaintiff's attorneys or to the witness as a corporate officer for the purpose of enabling plaintiff to prosecute this action, hence the reports are within the privilege of attorney and client. But the court in ordering the witness to answer limited its order as follows: "Excepting that said A. J. Horlick

need not, in answer to any of said interrogatories, testify as to any conversations or reports of plaintiff's officers or agents with or to plaintiff's attorneys, or conversations or reports by plaintiff's attorneys with or to plaintiff's officers or agents." Counsel for plaintiff insists that the court construed the privilege too narrowly, and that the privilege should extend to all reports from employees and agents which were made to a superior officer for the purpose of enabling the corporation to bring and prosecute this action or which were used therefor.

Our statute, sec. 4076, defines the privilege existing between attorney and client thus: "An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon in the course of his professional employment." This statute has been construed by this court. *Koeber v. Somers,* 108 Wis. 497, 84 N. W. 991; *Herman v. Schlesinger,* 114 Wis. 382, 90 N. W. 460.

*Dudley v. Beck,* 3 Wis. 274, is relied upon by plaintiff. An examination of this case will show that it does not extend the privilege beyond the terms of the present statute. In that case the question of usury was the issue and the relation of attorney and client existed in respect to the controversy. The examination was upon commission under the old practice to take testimony out of the state. The lower court held the communications privileged, and this court reversed it, holding they were not. But the whole question has been gone over by this court in later cases, notably *Koeber v. Somers, supra,* and *Herman v. Schlesinger, supra,* and the privilege confined strictly within the limits of the statute. The case of *Dudley v. Beck, supra,* is discussed in *Koeber v. Somers, supra.*

Many decisions are cited from other jurisdictions by counsel for plaintiff, all of which have been examined. Many of them are not in point, and others distinguishable from the

case at bar. We shall not prolong this opinion by a discussion of them, because we think the case here is ruled by our statute and the decisions of this court. The restriction of the examination by the court below was as broad as the privilege guaranteed by the statute.

(d) It is contended under this head that the production of the reports would constitute an unreasonable search and seizure, because it would allow defendants to uncover the business transactions of plaintiff, including its trade secrets. Whether the defendants were entitled to the trade secrets of plaintiff respecting the matter in controversy we need not decide, because we think the order of the court below does not go to the extent of requiring their production, as appears from the questions falling under this head, namely, Nos. 387, 405, 406, 413, 415, 424, 378, 381, 397, 424, 416, 374, 378, 384, 385, 386, and 446. Of these questions No. 381 is a fair example. "Q. 381. If you have any reports upon which you base your belief as to the truthfulness of that allegation, will you please tell me by whom such reports were made, whether in writing or by parol?" This question was objected to on several grounds, and among others that an order compelling an answer would constitute an unreasonable search and seizure under secs. 11 and 22 of art. I. Const. of Wis., and the Fourth amendment to the constitution of the United States, and sec. 1 of the Fourteenth amendment to the federal constitution. On this point counsel relies on *Hale v. Henkel,* 201 U. S. 43, 26 Sup. Ct. 370. That case is clearly distinguishable from the instant case. There it was held that an order for books and papers may be so drastic and unreasonable as to violate the constitutional provisions. Referring to the order the court said:

"It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Com-

pany, and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union."

The opinion further refers to the fact that the order was so sweeping, if executed, as to put a stop to the business of the company and therefore was unreasonable. No such objection can be made to the order here. The evidence sought to be obtained in the instant case was relevant on the matters put in issue by the plaintiff's complaint, and the order imposed no unreasonable burden upon the plaintiff. If the examination under the statute should be limited as insisted by counsel for plaintiff, the beneficent purpose of the statute so often referred to by this court would be greatly impaired. *Boyd v. U. S.* 116 U. S. 616, 6 Sup. Ct. 524, is also cited by counsel for plaintiff, but it will be seen that that case is not in point here. In that case it was held that the seizure or compulsory production of a man's private papers, to be used in evidence against him in a prosecution for a crime, penalty, or forfeiture, is unconstitutional.

(e) Respecting the point that a witness cannot be compelled to answer as to matters not within his knowledge, an examination of the record convinces us that no such order was made. The evidence developed upon the examination shows that the witness was only ordered to testify or produce where he had knowledge of the facts or could produce the things.

Question No. 400, asking for shape and style of dispensing jars from which the substitution was alleged to have been made and which for a time were in possession of the defendants, and question No. 416, asking for dates on which the substituted product was offered for sale, and question No. 511, asking for name of employee or officer of the de-

fendant company who it is claimed threatened to continue the substitution, were objected to as calling for evidence within the knowledge of the defendants and not within the personal knowledge of the witness, on the ground that the purpose of the statute is to give the party seeking the examination discovery of the facts not within his knowledge.

Counsel on this point relies on *Badger B. M. Co. v. Daly*, 137 Wis. 601, 119 N. W. 328; *Ellinger v. Equitable L. A. Soc.* 138 Wis. 390, 120 N. W. 235. We cannot see that these cases are in point here. In *Badger B. M. Co. v. Daly, supra,* the appeal was from an order limiting the examination asked by defendants, and it was held that the order was proper under the discretionary power of the court, and that no further examination than as provided by the order was necessary, and that matters on which examination was asked and not allowed by the order were obviously within the knowledge of the defendants. In the *Ellinger Case* it was held that the affidavit of a party for examination under sec. 4096 is not conclusive upon the trial court as to matters necessary to enable him to plead; and such court may in its discretion limit the subjects to which the examination shall extend or may forbid the examination entirely, and its discretion will not be disturbed unless there be abuse of discretion. It is by no means clear from what developed upon the examination that the evidence sought was obviously in the possession of the defendants, and the court below was in a better position to pass upon that question than this court. It cannot be said in the instant case that there was an abuse of discretion.

Questions Nos. 363 and 364 ask for ingredients of an abandoned product of plaintiff, and for the ingredients of "Horlick's Malted Milk," its present product. The ingredients of the plaintiff's product involved a vital issue in the case, because it was necessary to determine whether the

plaintiff's product was what it was represented to be; therefore the evidence as to what the ingredients are, was relevant to the issue.

Questions Nos. 374 and 446 ask that the witness produce certain bottles and contents which were in defendant's store and from which the substitution was made. Testimony of the witness showed that two dispensing jars labeled "Horlick's Malted Milk" from which the substituted product was alleged to have been sold by defendant were given to the agent of the plaintiff by the defendant's employees, and the production of these bottles and contents was requested by the questions under discussion.

The claim of the plaintiff is that these questions were improper for the reason that a party to a civil action is not entitled to an order for inspection of real or personal property in the possession of the opposing party in the absence of statute, and that sec. 4096, which provides for the production of "all papers, books, files, records, things, and matters . . . may be compelled upon subpœna, . . ." does not include physical objects. We think the construction of counsel is too narrow. The jars and contents, under the issues raised by the complaint, were doubtless among the most important matters in the case. The fact that they were physical objects did not exclude them from the terms of the statute. "Books, files, and records" are in a sense physical things, at least to the extent of the material of which they are composed, although they contain written information. The board or shingle on which the scaler of logs or lumber keeps his account is a physical thing, yet it would not be contended that, if it contained evidence relevant to the case, production of it could not be compelled under this statute. The purpose of the statute is to get inspection of the evidence contained in the books, files, records, and things. If the things, namely, the jars and contents, were relevant to the controversy, they come within the terms of the statute.

Under this head we are cited by counsel for plaintiff to *Carpenter v. Winn,* 221 U. S. 533, 31 Sup. Ct. 683. The question in that case turned on the construction of sec. 724, R. S. of U. S., being the fifteenth section of the Judiciary Act, as to whether this act, which provided for production "in the trial," was broad enough to require production *before* trial. The court held that the provision was a substitute for the bill of discovery, and that it could be invoked only when the document sought "contained evidence pertinent to the issue" and "in cases and under circumstances when they might be compelled to produce the same by the ordinary rules of proceeding in chancery." We are not limited, however, under our statute, which is a substitute for the bill of discovery, to the rules in chancery under the bill of discovery. Discovery was not a matter of strict right in equity under the bill of discovery. Discovery under sec. 4096 is broader than in equity. *Kelly v. C. & N. W. R. Co.* 60 Wis. 480, 19 N. W. 521; *Schmidt v. Menasha W. W. Co.* 92 Wis. 529, 66 N. W. 695; *Hughes v. C., St. P., M. & O. R. Co.* 122 Wis. 258, 99 N. W. 897.

In *Meier v. Paulus,* 70 Wis. 165 (35 N. W. 301), at page 170 this court said:

"The very object of the old bill of discovery was to procure evidence against the opposite party, to be used on the trial of an action. . . . The statute undoubtedly goes further than the bill of discovery, and not only allows an examination of the party as to those matters which the party seeking the examination cannot prove by other witnesses or testimony, but it allows an examination as to all the material issues in the action."

It is further insisted that a group of questions asking for names and addresses of witnesses were improper. For example, question No. 405 reads: "Q. You say you had some reports concerning the facts alleged to which I have called your attention. Who were these reports from?" "Q. No.

371. Where can Mr. Jack Bates, one of your employees whom you got to call on *Mr. Spiegel,* be addressed so that he can be reached?" "Q. 444. What is the chemist's name?" There was no abuse of discretion in ordering these questions answered, under the authorities hereinbefore cited. Counsel cites on this point *Collins v. C. & N. W. R. Co.* 150 Wis. 305, 136 N. W. 628. In that case it was held, on trial of the case, not error to exclude a question on cross-examination of plaintiff as to whether he had subpœnaed a certain named witness and as to whether he knew that such person would be a witness. The case has no bearing here. *Wabash & W. R. Co. v. Morgan,* 132 Ind. 430, 31 N. E. 661, 32 N. E. 85, is cited as being directly in point. The case seems somewhat in point, but we think it distinguishable, and if not distinguishable we cannot follow it under the liberal construction given our statute. But in the Indiana case the decision turned on the point that the questions were useless for any purpose. The form of the question was, "Who told you so?" 132 Ind. at page 436. The court held that the statute required the witness to testify to matters within his knowledge and that the question asked did not concern any matter stated in the pleadings.

*Spinney v. Boston E. R. Co.* 188 Mass. 30, 73 N. E. 1021, is also cited. But that case turned upon a statute providing that "the party interrogated shall not be obliged . . . to disclose the names of the witnesses by whom, or the manner in which, he proposes to prove his own case." So the case has no bearing here.

Without further extending this opinion, it is sufficient to say that we are convinced that there was no abuse of discretion in ordering the several questions answered, therefore the part of the order appealed from by the plaintiff must be affirmed.

We are of opinion that the defendants' appeal must be

dismissed for the reason that the part of the order appealed from by defendants is not appealable. Sec. 3069, Stats.

*By the Court.*—That part of the order appealed from by the plaintiff is affirmed. The defendants' appeal is dismissed.

BARNES, J., dissents from the decision on plaintiff's appeal.

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SCHENCK and another, Respondents, vs. STERLING ENGINEERING & CONSTRUCTION COMPANY, Appellant.

*November 20—December 9, 1913.*

**Res judicata: *Former adjudication: Appeal: Double costs.***

1. **The judgment of this court upon appeal in a former action between the same parties, wherein the same questions were litigated and determined, is conclusive upon the parties in this action.**
2. **Double costs under sec. 2951, Stats., are not allowed to respondents in this case, although the parties are held to be concluded by a former judgment of this court.**

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This action was brought by the respondents to recover commission for the alleged sale of certain real estate belonging to appellant. Shortly after the commencement of respondents' action one *Franklin H. Feasley* commenced an action against the appellant in the same court to recover commission for the alleged sale of the same property. The appellant answered in each of the actions denying liability, and in the instant action set up in its answer the commencement of the action by *Franklin H. Feasley,* and after exami-

nation under sec. 4096, Stats., a motion was made asking that *Franklin H. Feasley* be made a party to this action and that he be restrained from prosecuting his action separately and apart from this action, and that the whole controversy be tried in one trial to avoid a multiplicity of actions. The motion was denied. The appellant appealed, assigning error in denial of motion to make *Feasley* a party to this action and in refusal to perpetually restrain him from prosecuting his action separately and apart from this action.

*G. J. Davelaar,* for the appellant.

*H. L. Kellogg,* for the respondents *Schenck* and *Hayward.*

For the respondent *Franklin H. Feasley* there was a brief by *Perry, Morton & Kroesing,* and oral argument by *George E. Morton.*

KERWIN, J. The same questions presented between the same parties here were litigated and determined in a former action and disposed of on a former appeal in this court. *Schenck v. Sterling E. & C. Co.* 151 Wis. 266, 138 N. W. 637, 769. The appellant contends that a different question is presented on this appeal. But an examination of the record shows that the issues are the same. The parties are therefore concluded by the judgment of this court on the former appeal. *State ex rel. Kurath v. Ludwig,* 146 Wis. 385, 132 N. W. 130; *Kiley v. C., M. & St. P. R. Co.* 142 Wis. 154, 125 N. W. 464; *Jeffery v. Osborne,* 145 Wis. 351, 129 N. W. 931; *West v. Bayfield M. Co.* 149 Wis. 145, 135 N. W. 478; *Roach v. Sanborn L. Co.* 140 Wis. 435, 122 N. W. 1020; *Twentieth Century Co. v. Quilling,* 136 Wis. 481, 117 N. W. 1007; *Case v. Hoffman,* 100 Wis. 314, 75 N. W. 945.

The respondents insist that double costs under sec. 2951, Stats., should be allowed them. We are not inclined, however, to allow double costs or anything further than the usual costs on affirmance.

*By the Court.*—The order appealed from is affirmed.

KAREL, Respondent, vs. CONLAN, imp., Appellant.

*November 20—December 9, 1913.*

*Discovery: Examination of party before trial: Witnesses: Self-incrimination: Privilege in civil action: Contempt: Libel: Civil and criminal liability: Appeal: Appealable orders: Remanding cause for exercise of discretion.*

1. An order of the circuit court affirming an order of a court commissioner made upon the examination of a party under sec. 4096, Stats., adjudging the witness in contempt for refusing to answer certain questions, and fixing his punishment therefor, is a final order in a special proceeding and is appealable.
2. The proofs to sustain a civil action for conspiracy to publish a libel would also tend to render the defendant liable for a criminal conspiracy under sec. 4568, Stats., and for criminal libel under sec. 4569.
3. Even if it were the rule that when a witness testified under protest the information elicited could not be used against him in subsequent criminal proceedings, that rule would not furnish the full protection against self-incrimination which the constitution contemplates, and hence would not justify compelling him to answer when he claimed his privilege, since the facts disclosed might be proved against him by other evidence perhaps obtained and obtainable only by reason of the compelled disclosure.
4. A witness cannot invoke the claim of privilege for the purpose of shielding himself from civil liability; but under the constitution (art. I, sec. 8) construed in the light of the common law and of statutory declarations (sec. 4077, Stats.), in no case, whether civil or criminal, can a witness, in the absence of an immunity statute or its equivalent, be compelled to give an answer that may criminate him.
5. Upon reversing an order adjudging a witness in contempt for refusing to answer certain questions on the ground that the answers might tend to criminate him, where it appears that the trial court did not exercise its discretion as to what questions should be answered, but merely ruled that no privilege could be claimed in a civil action, the case is remanded for further proceedings, to the end that such discretion may be exercised in the first instance by the trial court.
6. The opinion of a witness that an answer to a question will tend to criminate him is not conclusive, but he should not be compelled to answer unless it is reasonably clear that the answer, whatever it may be, can have no such effect.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

Civil action for damages brought against the defendant *Conlan* and others for a criminal conspiracy to libel. The alleged dissemination of a printed circular, referred to as Exhibit 1, appears to form the basis of the action. It contains the following language:

"To the Honorable *John C. Karel,* County Judge of Milwaukee County: That the public records in the county court show the notorious fact that you have from time to time permitted crafty attorneys and guardians *ad litem* to plunder the estates of orphans and widows of thousands of dollars, and in some instances as high as twenty-five thousand dollars. . . . That while the widows and orphans have been clamoring to have their business transacted in the county court, you have been the pliant candidate for governor at the request of special interests, big business and tax dodgers, with or without pay."

After service of the summons, upon an affidavit therefor an order was obtained for an examination of the defendants under sec. 4096, Stats. 1911, to enable the plaintiff to plead. The examination was had before a court commissioner, and the defendant *Conlan,* after being ordered by the commissioner to answer, refused to answer a number of questions put to him by plaintiff's counsel on the ground that the answers would tend to incriminate him. The following are fair samples of the questions the witness refused to answer:

"Where did you first see the proof for the printed document Exhibit 1? Did you prepare the copy for this paper, Exhibit 1? Who gave the order for printing Exhibit 1? Who did you consult with before ordering this paper referred to, Exhibit 1, printed? Did you have any meeting of county committee, or any of its members, at which the matter of the issuance of Exhibit 1 was discussed? Who besides yourself had anything to do with the preparation of the copy for this paper Exhibit 1? How did this Exhibit 1 come to be issued or printed and circulated? When was Exhibit 1 first brought to your attention in its printed

form? Did you order it printed? How many did you order printed? Did you show Exhibit 1 to Mr. Bollow at any time before it was printed? Who gave the defendant L. Breithaupt Printing Company, or any of its officers or agents, directions about the printing of this document Exhibit 1? Were you present at any time when any copy was prepared or directions given in regard to the printing of Exhibit 1 and its duplicates? Did you hire anybody to aid in the distribution or to distribute them? Who paid for the distribution of these papers, the mailing, postage stamps, stationery, and the services involved in the mailing of them? By whose suggestion was the stamp placed upon these papers apparently made by a rubber stamp, Return to Room 300, Foster Building, 403 Grand avenue, corner Fourth street? Who ordered the stamp made? Did you have anything to do with obtaining any room in the Foster Building or elsewhere, for the purpose of having these papers distributed and received after they had been sent out and returned? Did you ever read the matter before it was printed, the matter contained in Exhibit 1? Did you believe the statements in Exhibit 1 were true, before they were circulated? Did Mr. Fred Lorenz and Mr. Theodore Kronshage, or either of them, ever talk with you about issuing these circulars before they were issued? Did Mr. Fred Lorenz talk with you about it before they were printed? Had Mr. Theodore Kronshage talked with you about it before they were printed? Do you know whether or not the printing of this Exhibit 1 was done by the L. Breithaupt Printing Company?"

It appeared that one Frank L. Prescott distributed copies of Exhibit 1 at the South Side Turn Hall, Milwaukee. The witness was interrogated at length as to his connection with such distribution, in each case refusing to answer the questions on the ground that the answers might tend to incriminate him.

The questions which the witness refused to answer were certified to the circuit court and it affirmed the ruling of the commissioner and ordered the witness to answer the questions. The witness again refused, claiming his constitutional privilege, and the court commissioner adjudged him in

contempt, and ordered his imprisonment in the county jail of Milwaukee county until he shall answer the questions and pay the sum of $50 costs and expenses. The circuit court, upon review, entered an order affirming the order of the court commissioner, and from such order of the circuit court the defendant *Conlan* appealed.

The cause was submitted for the appellant on the brief of *Kronshage, Hannan & McMillan,* and for the respondent on that of *Doe & Ballhorn.*

VINJE, J. The appealability of the order is challenged by the respondent, and the cases of *Phipps v. Wis. Cent. R. Co.* 130 Wis. 279, 110 N. W. 207, and *Neacy v. Thomas,* 148 Wis. 91, 133 N. W. 580, are relied upon to sustain the challenge. In the former case it was held that the examination of a party under the provisions of sec. 4096, Stats., is both a special proceeding and a provisional remedy, but that an order requiring witnesses to produce certain books and papers made in the course of the examination was in no sense a final order within the meaning of sec. 3069, Stats., and therefore was not appealable. In the latter case the appeal was from orders requiring certain questions propounded to a witness to be answered by him and sustaining the witness's claim of privilege as to others. It was decided that such orders were not appealable, on the ground that they were merely rulings upon the admission or exclusion of evidence.

In the case before us, however, we have a ruling made by the circuit court affirming a ruling of a court commissioner that the witness be required to answer certain questions, the refusal of the witness to answer as directed, the finding of the court commissioner that the witness was in contempt, an order adjudging him to be in contempt and fixing his punishment therefor, and the affirmance of such order of the commissioner by an order of the circuit court. Such later order was a final order in a special proceeding within the

meaning of sec. 3069. Nothing further remained to be done. The guilt and punishment of the witness were finally adjudicated unless reversed upon appeal.

The gist of the action, as disclosed by the affidavit filed in support of the examination, is a conspiracy to libel the plaintiff. While the present action is a civil one for damages, if proven it would present facts tending to render appellant liable for a criminal conspiracy under sec. 4568, Stats. 1911, which provides that "Any person guilty of a criminal conspiracy at common law shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars." It would also tend to subject him to punishment under the provisions of sec. 4569, which reads: "Any person guilty of libel shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding two hundred and fifty dollars."

Our statutes provide for no immunity for appellant in case of his giving incriminating evidence. The question, therefore, arises, Is he, in a civil action, privileged from answering under the principles of the common law and the constitutional provisions of this state and of the United States that no person "shall be compelled in any criminal case to be a witness against himself"? Sec. 8, art. I, Const.; U. S. Const. Fifth Amendm. It seems the circuit court held that, this being a civil action for damages, the witness could not successfully claim his privilege for the purpose of shielding himself from liability in the action, and that he could not avail himself of the constitutional privilege not to incriminate himself, because if he gave his answers under protest the information thus elicited could not be used against him in subsequent criminal proceedings. That a witness cannot invoke the privilege for the purpose of avoiding civil liability is settled by the provisions of sec. 4077, Stats., hereinafter referred to. The second ground given

by the circuit court is not tenable. The respondent cites the following cases as sustaining the decision of the trial court: *Keith v. Woombell,* 8 Pick. 211; *Boston & M. R. Co. v. State,* 75 N. H. 513, 77 Atl. 996; *People v. Cahill,* 126 App. Div. 391, 110 N. Y. Supp. 728, affirmed 193 N. Y. 232, 86 N. E. 39; *State v. Sieber,* 49 Oreg. 1, 88 Pac. 313; *Patterson v. Wyoming Valley Dist. Council,* 31 Pa. Super. Ct. 112; *U. S. v. Distillery,* 6 Biss. 483; *U. S. v. McCarthy,* 18 Fed. 87; *O'Neil v. People,* 113 Ill. App. 195; *In re Burrows,* 33 Kan. 675, 7 Pac. 148; *Cogan v. Cogan,* 202 Mass. 58, 88 N. E. 662; *State ex rel. Dye v. Reilly,* 40 Wash. 217, 82 Pac. 287; *In re Strouse,* 1 Sawy. 605; *U. S. v. Three Tons of Coal,* 6 Biss. 379; *Tom Wah v. U. S.* 163 Fed. 1008; *Law Chin Woon v. U. S.* 147 Fed. 227.

*Keith v. Woombell,* 8 Pick. 211, was an application in a suit in equity to obtain possession of a bond admitted by defendant to be under her control. It was held that she could be ordered to leave it with the clerk of the court, with liberty to the plaintiff to take a copy thereof. The remark in the opinion that the provision of the constitution that a subject is not to be compelled to "furnish evidence against himself" did not relate to a civil matter was purely *obiter.* It is evident that no subsequent criminal liability could arise from the inspection of the bond, and none was claimed. In *Boston & M. R. Co. v. State,* 75 N. H. 513, 77 Atl. 996, it was held in an action for abatement of taxes that a witness could not refuse to disclose material and relevant facts as to the value of his own property on the ground that such evidence would reveal the details of his private business affairs and might result to his pecuniary disadvantage. No fear of connecting the witness with any subsequent crime or degrading him in any manner was suggested in the case. In *People v. Cahill,* 126 App. Div. 391, 110 N. Y. Supp. 728, it was held that the privilege did not extend where there had been a pardon for the crime in question, or where statutes

of limitation or immunity removed the danger of prosecution, since the object of the constitutional privilege was to protect the witness. In *State v. Sieber,* 49 Oreg. 1, 88 Pac. 313, it was held that under a constitutional provision that "no person shall be . . . compelled in a criminal prosecution to testify against himself," the witness could not claim the privilege of refusing to answer on the ground that the answers might tend to show that he was guilty of violating an injunctional order issued in a suit between private parties, because a punishment for such violation was not a punishment for a crime within the meaning of the words "criminal prosecution" contained in the constitution. Substantially the same was held in *Patterson v. Wyoming Valley Dist. Council,* 31 Pa. Super. Ct. 112, that being a case to establish a contempt in an action affecting the rights of private parties. It was held that such a proceeding was civil and not criminal, and such proceeding was distinguished from proceedings instituted solely for preserving the dignity and power of the court, which were held to be criminal and punitive in their nature, while those instituted for enforcing the rights of private parties to a suit were civil in their nature. The case of *U. S. v. Distillery,* 6 Biss. 483, was a prosecution under the internal revenue laws, and the court said: "The question, therefore, of compelling a person to accuse himself in a criminal case is not before the court." The case turned upon the construction of several federal acts as to the power of the court to compel a defendant to produce certain books and papers relevant to the matter in issue. In the case of *U. S. v. McCarthy,* 18 Fed. 87, it was held the witness could not avail himself of the constitutional privilege, because sec. 860 of the Revised Statutes of the United States afforded complete immunity. That part of the decision holding that the Fifth amendment to the constitution, providing that "no person shall be compelled in any criminal action to be a witness against himself," applies

only to evidence in suits or proceedings instituted against the witness himself, was expressly ruled to the contrary in *Counselman v. Hitchcock,* 142 U. S. 547, 12 Sup. Ct. 195. The cases of *O'Neil v. People,* 113 Ill. App. 195, and *In re Burrows,* 33 Kan. 675, 7 Pac. 148, involved contempt proceedings, irrelevant to any question at issue in this case. In *Cogan v. Cogan,* 202 Mass. 58, 88 N. E. 662, there was a petition for the appointment of a guardian for the respondent on the ground that he was insane. The court held that since the proceeding was civil and not criminal the respondent could properly be called and examined as a witness. So in the case of *State ex rel. Dye v. Reilly,* 40 Wash. 217, 82 Pac. 287, it was held that a contempt proceeding was not a criminal case within the meaning of sec. 9, art. I, Const., which provides that no person shall be compelled to give evidence against himself. *In re Strouse,* 1 Sawy. 605, was a case where books were required to be produced pursuant to the provisions of the Internal Revenue Act, and it was held that sec. 860 of the Statutes of the United States provided a complete immunity, therefore the constitutional provision did not apply. *U. S. v. Three Tons of Coal,* 6 Biss. 379, related to the production of books under the Internal Revenue Acts, and it was held that if the legislative protection against the witness's evidence being used against himself is as broad as the constitutional provision against a person incriminating himself, he could be compelled to answer. In *Tom Wah v. U. S.* 163 Fed. 1008, it was held that a Chinese person against whom deportation proceedings are pending may be called as a witness of the United States and may be compelled to answer questions relevant to the pending issue, since such proceedings were civil and not criminal. The same ruling was made in *Law Chin Woon v. U. S.* 147 Fed. 227.

It will thus be seen that the cases cited fall into several general groups quite distinct from the question presented in

this case. In some of the cases the issue was whether that particular proceeding was a civil or a criminal one. Of course, if it was a civil proceeding the defendant could be called as a witness. In others it was held that where the witness was protected by immunity statutes, by a pardon, by statutes of limitations, or by having served a sentence, he could not claim the constitutional privilege; and in still others it clearly appeared that the information called for had no tendency to incriminate or degrade the witness in any respect. In none was it held that if the witness testified under protest the information elicited could not be used against him in subsequent criminal proceedings. Such a rule, if one obtained, would not furnish the protection which the law contemplates. Immunity from using the evidence which discloses certain facts is not immunity from proving such facts by other evidence perhaps obtained and obtainable only by reason of the compelled disclosure.

Recurring now to the question of whether or not in a civil proceeding a witness can shield himself from giving incriminating evidence, reference should be had not only to the constitutional provision above quoted but to long established principles of common law and to statutory declarations on the subject. Sec. 4077, Stats. 1911, provides:

"Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue on the ground merely that the answer to such question may establish or tend to establish that such witness owes a debt or is otherwise subject to a civil action. But this provision shall not be construed to require a witness to give any answer which shall have a tendency to accuse himself of any crime or misdemeanor or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses."

This is a literal copy of sec. 74, ch. 98, of the Revised Statutes of 1849, with only the substitution of the words "civil action" for the words "civil suit," and has remained

a part of our statutory law since. That the principal part of it was originally copied from 46 Geo. III, ch. 37, there can be little doubt. That statute provided "That a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture, of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or of any other person or persons." The necessary implication from the latter statute, that when the answer tended to accuse himself or to expose him to penalty or forfeiture of any nature he could not be compelled to answer, was more clearly emphasized in our statute by the express provision that it should not be construed to require a witness to give such an answer. These statutes were but the crystallization of principles of law theretofore and since announced by the courts. *Trial of Freind* (1696), 13 How. St. Tr. 1, 16, 17; *Trial of Earl of Macclesfield* (1725), 16 How. St. Tr. 767, 1149, 1150; *Rex v. Slaney* (1832), 5 Carr. & P. 213. The latter case is very similar to the one at bar. There was an information for libel, and a clerk was called and asked who wrote one of the libelous articles. He declined to answer because it might criminate him. TENTERDEN, C. J., ruled:

"He is not bound to do that, because it may be himself. You cannot only not compel a witness to answer that which will criminate him, but that which tends to criminate him; and the reason is this, that the party would go from one question to another, and though no question might be asked, the answer of which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him."

That is as true now as when it was uttered. The case of *Gates v. Hardacre* (1811), 3 Taunt. 424, was a civil ac-

tion by an indorsee against the drawer of a bill. The defense was usury. A witness was called and asked "whether that bill had ever been in his possession before." Upon being cautioned that the answer might tend to show him guilty of usury he declined to answer. The court refused to compel him, MANSFIELD, C. J., saying: "Your questions go to connect the witness with the bill, and they may be links in a chain." *Maloney v. Bartley* (1812), 3 Camp. 210, was also a civil case of libel, and a witness was excused from answering on the ground that the answer might tend to criminate him. These early English cases are referred to for the purpose of showing how ancient and well founded is the principle that in no case, whether civil or criminal, can a witness, in the absence of an immunity statute or its equivalent, be compelled to give an answer that may criminate or tend to criminate him.

This principle is well recognized in the jurisprudence of our own country. Perhaps the leading case on the subject is *Counselman v. Hitchcock,* 142 U. S. 547, 12 Sup. Ct. 195. In that case the authorities are cited and discussed, and the case of *People ex rel. Hackley v. Kelly,* 24 N. Y. 74, which held that the constitutional provision related only to cases in which the witness was a defendant, was disapproved. The court say:

"It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases, but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard." Page 562.

In *People ex rel. Lewisohn v. O'Brien,* 176 N. Y. 253, 68 N. E. 353, the *Kelly Case* is overruled, leaving the au-

thorities practically unanimous that the privilege can be invoked in any judicial proceeding. Rapalje on Witnesses, sec. 261, thus states the rule:

"*Nemo tenetur seipsum accusare.*—Liberally translated, this maxim, which is one of the oldest of the common law, means that any person, whether a party or stranger to the litigation, either in a civil suit or criminal prosecution, may, if he sees fit, refuse to answer any question put to him as a witness, either on direct or cross-examination, the answer to which, if true, will render or tend to render him punishable for crime, or disgrace him, or render him infamous. The soundness of the principle introduced into the common law by this maxim has seldom been questioned. It has been incorporated among the guaranties of personal liberty and security in all the constitutions both of England and America, and has received the sanction of the most eminent jurists of both countries."

In the case of *In re Falvey,* 7 Wis. 630, the witnesses were compelled to testify in a legislative investigation because there was an immunity prescribed for in the act under which the investigation was had (see p. 641), and it is there said that "if the answer would tend to criminate or expose the witness to a criminal prosecution in the courts of another state or in the courts of the United States, he might not be compelled to answer." That the privilege may be claimed by a witness in a civil suit was expressly decided in *State ex rel. Hopkins v. Olin,* 23 Wis. 309. That was an action to try title to an office, and it was held that a witness could not be compelled to testify whether he voted at a particular election if the evidence would tend to criminate him.

The constitutional provision of Massachusetts is that no subject shall "be compelled to accuse, or furnish evidence against himself." In construing this provision in *Emery's Case,* 107 Mass. 172, 181, the court says:

"By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted

for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner; although not in the course of any pending prosecution.

"But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending, or that might be brought against him therefor, such disclosure would be an accusation of himself, within the meaning of the constitutional provision. In the absence of regulation by statute, the protection against such self-accusation is secured by according to the guilty person, when called upon to answer as witness or otherwise, the privilege of then avowing the liability and claiming the exemption; instead of compelling him to answer and then excluding his admissions so obtained, when afterwards offered in evidence against him.

"This branch of the constitutional exemption corresponds with the common-law maxim, *Nemo tenetur seipsum accusare,* the interpretation and application of which has always been in accordance with what has been just stated. Broom, Max. (5th ed.) 968; Wingate, Max. 486; Rosc. Crim. Ev. (2d Am. ed.) 159; Stark. Ev. (8th Am. ed.) 41, 204, and notes; 1 Greenl. Ev. § 451, and notes."

For a full and late discussion of the subject, see 1 Wharton, Crim. Ev. (10th ed.) §§ 463 *et seq.;* 30 Am. & Eng. Ency. of Law (2d ed.) 1154 *et seq.* See, also, *People ex rel. Taylor v. Forbes,* 143 N. Y. 219, 228, 38 N. E. 303; *People v. Priori,* 164 N. Y. 459, 464, 58 N. E. 668; *Minters v. People,* 139 Ill. 363, 29 N. E. 45; *Ex parte Carter,* 166 Mo. 604, 66 S. W. 540; *Poindexter v. Davis,* 6 Grat. 481; *Broadbent v. State,* 7 Md. 416.

In view of our statutory and constitutional provisions

and the almost uniform rule of law that has obtained in England and in this country from the earliest times, there can be no question but that the privilege extends to a witness in a civil proceeding as well as in a criminal case. To hold otherwise would be to emasculate the essential principle of the rule, for the commission of nearly every crime carries with it a civil liability. A person suspected of a crime could be proceeded against civilly and compelled to disclose the very facts essential to a conviction, leaving him practically without any privilege whatever. The maxim of *Nemo tenetur seipsum accusare* was so firmly entrenched in English law that the framers of our own constitution evidently did not deem it necessary to specifically declare it as to civil cases where only private interests were at stake and the incriminating facts were desired only in order to establish a civil liability for the benefit of a private party. But it was deemed essential to declare the rule in criminal cases for the purpose of negativing the right of the state itself to elicit such information even in the administration of the criminal law which affects the public at large.

The circuit court, therefore, erred in ruling that the witness was compelled to answer the questions propounded to him, or at least a major portion of them. And since the discretion of that court was not exercised upon what questions should or should not be answered, we deem it better practice to reverse the order and remand the case for further proceedings, to the end that such discretion may be exercised by the trial court in the first instance, rather than that this court should pass upon the matter now. The rule should be borne in mind that while the opinion of the witness that an answer to a question will tend to criminate him is not conclusive upon the trial court, yet the witness should not be compelled to answer unless it appears reasonably clear that the answer, whatever it may be, can have no such effect. *Kirschner v. State,* 9 Wis. 140; *Emery v.*

*State,* 101 Wis. 627, 78 N. W. 145; *Rudolph v. State,* 128 Wis. 222, 230, 107 N. W. 466; *Counselman v. Hitchcock,* 142 U. S. 547, 12 Sup. Ct. 195; *McGorray v. Sutter,* 80 Ohio St. 400, 89 N. E. 10, and note to same in 24 L. R. A. N. S. 165 *et seq.,* where the authorities are collected.

The result reached renders it unnecessary to consider the other errors relied upon for reversal.

*By the Court.*—The order appealed from is reversed, with directions to vacate and set aside the contempt proceedings and the order of commitment entered therein, and the cause is remanded for further proceedings according to law.

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HANSEN, Administrator, Appellant, vs. MILWAUKEE COKE & GAS COMPANY, Respondent.

*November 21—December 9, 1913.*

***Master and servant: Negligence: Death of employee: Nonsuit: Unguarded machinery.***

**In an action for death of an employee whose duty it was to grease the cables which operated the machinery in defendant's plant and whose body was found suspended from angle irons or girders in the shaft of a heavy counterweight which was a part of the apparatus used in the plant for handling coal, a judgment of nonsuit is *held* to have been proper, there being no evidence sufficient to warrant a finding that any negligence of defendant contributed to the injury or death of the deceased, and the whole question as to how he came in contact with the counterweight being matter of conjecture. [Whether the apparatus in question was a "gearing," a "hoist," or an "elevator," which the statute (sec. 1636*j*, Stats.) required to be guarded, is immaterial and is not considered.]**

APPEAL from a judgment of the circuit court for Milwaukee county: FRANK A. ROSS, Judge. *Affirmed.*

This action was brought by the plaintiff to recover damages for the death of his son, who was killed in the defendant's plant in Milwaukee April 28, 1911, by being caught by a large metal counterweight which moved up and down between guides and which was a part of the mechanical apparatus used in the defendant's plant for handling coal. The machinery in question consisted of a coal bridge about 550 feet in length, one end of which stands on a pivot, which pivot is about thirty feet high. On top of the pivot is a track upon which trucks are operated, upon which rests an upright structural steel frame about forty feet high, which supports the end of the bridge proper. The other end of the bridge runs on a semi-circular track and can be moved through a half circle. There are ladders on one side of this upright frame at the pivot end of the bridge and platforms for mounting to the top of the bridge with railings around the platforms. On the side opposite the ladders and platforms and about thirty feet distant therefrom on the outside of the upright frame were guides for the counterweight, which ran from near the tracks on which the bridge revolved almost to the top of the bridge. There was a platform used for oiling the sheaves of the counterweight which was reached from the engine house. It was the duty of one Joe Maroon to oil the sheaves of the counterweight, and for this purpose the machinery was always stopped and not started until Maroon gave the signal. Plaintiff's intestate was employed as a greaser, and it was his duty to clean the platforms, stairs, and ladders, and to grease the cables which operated the machinery. This greasing was done by holding a paint brush saturated with grease against the cable while in motion. At the top of the counterweight guides was a platform protected by railings where the plaintiff's intestate could reach the counterweight cable where it went over the sheave, at which point he was instructed to grease the cable and where he did customarily grease it.

* Hansen v. Milwaukee Coke & Gas Co. 155 Wis. 235.

There was a five-ton coal bucket operated by the machinery used for carrying coal from the yard below the bridge to the hopper in the pivot. The counterweight which ran in the guides went up when the bucket went down and an operator controlled it. The bucket was raised and lowered once in about four minutes, that being the required time to carry and discharge a load.

The plaintiff's intestate was last seen alive at the door of the engine room about ten feet from the bottom of the guides of the counterweight. The body was found hanging in the shaft of the counterweight suspended from angle irons or girders.

At the close of the evidence on the part of the plaintiff the court ordered a nonsuit. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

KERWIN, J. We think the court below was right in granting a nonsuit. There is no evidence in the record sufficient to carry the case to the jury on the question of defendant's negligence.

Counsel for appellant argues that the coal-raising apparatus in question used to operate the large coal bucket was a "gearing," a "hoist," or an "elevator" within the meaning of sec. 1636*j,* Stats., and should have been guarded; that the counterweight was so located as to be dangerous to employees in the discharge of their duties; and that the failure to guard was the cause of the injury and death of deceased.

The principal part of appellant's argument is devoted

to this subject. It is insisted by counsel for appellant that the judgment of nonsuit was granted on the ground that the case does not come within the provisions of sec. 1636*j*, hence there was no duty upon the defendant to guard the counterweight. But it will be seen from an examination of the opinion of the court below that the nonsuit was not based upon that ground alone; the court also held that the plaintiff failed to establish that the deceased met his death while in the line of his duty imposed by his employment, and that the evidence is insufficient to place the liability upon the defendant in any event.

In the view we take of the case it is unnecessary to consider whether the counterweight was a gearing, a hoist, or an elevator which the statute required to be guarded, because in any view of the case there is no evidence sufficient to warrant the jury in finding that any negligence of defendant contributed to the injury or death of the deceased. The whole question as to how deceased came in contact with the counterweight is matter of conjecture.

Upon the undisputed evidence this case is ruled in respondent's favor by the following cases in this court: *Hamann v. Milwaukee B. Co.* 127 Wis. 550, 106 N. W. 1081; *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Kaszubowski v. Johnson S. Co.* 151 Wis. 149, 138 N. W. 54; *Stock v. Kern,* 142 Wis. 219, 125 N. W. 447.

We deem further discussion of the case unnecessary. We are convinced that the court below was right in ordering a nonsuit.

*By the Court.*—The judgment is affirmed.

SCHNEIDER, Respondent, vs. MILLER and others, imp., Appellants.

*November 21—December 9, 1913.*

***Mortgages: Foreclosure: Receivers: Removal: Appeal by receiver: Deficiency judgment against wife.***

1. After the plaintiff in an action to foreclose a first mortgage had applied for a receiver, and after notice of *lis pendens* had been filed, an action to foreclose a second mortgage was commenced without making said plaintiff a party, and thereafter judgment by default was taken in the second action and a receiver appointed therein, without notice to the plaintiff in the first action, to collect the rents and profits of the mortgaged premises. Said plaintiff, who was entitled to have the rents and profits applied on the first mortgage, made the receiver a defendant in the first action. *Held*, that the court had the right to remove such receiver and appoint another in his stead.
2. Such receiver having answered in the first action that he was indifferent whether he continued as receiver or not, and having appealed without leave of court from a judgment for plaintiff in that action, it is *held* that he has no substantial ground upon which to ask for a reversal of that judgment.
3. Where the mortgaged property was owned jointly by husband and wife and the note secured was signed by both, and the mortgage was given to pay a prior mortgage on the same premises, it was proper in the judgment of foreclosure to provide for a deficiency judgment against the wife.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

*S. W. Dalberg,* for the appellants.

For the respondent there was a brief by *Austin, Fehr & Gehrz,* and oral argument by *G. G. Gehrz.*

BARNES, J. This action was brought in October, 1911, to foreclose a mortgage given to secure the payment of three notes dated October 28, 1903, and which by their terms became due in one, two, and five years from date. In April, 1912, the summons and complaint were amended so

as to bring in additional parties, and they were again amended in August, 1912, for the same purpose. The defense interposed was that the time of payment of the notes had been extended so that there was nothing due when the action was brought. It was also alleged that plaintiff was not entitled to have a receiver appointed, because the premises constituted the homestead of the mortgagors and because a receiver had already been appointed in another action. The court found all the issues in favor of the plaintiff. The mortgagors, *John* and *Anna Miller,* appeal from the judgment, as does *Julia D. Bowers,* the assignee of a second mortgage on the premises. *A. C. Rudolph,* the receiver appointed in the action brought to foreclose a second mortgage on the premises, also appeals.

The errors relied on are: (1) Failure to find that the time of payment had been extended. (2) Refusal to hold that the mortgaged premises were the homestead of the mortgagors. (3) Appointment of a receiver. (4) Allowing interest on past-due instalment of interest and on amount paid by mortgagee for insurance. (5) Allowing costs and $100 solicitor's fees. (6) Ordering a judgment for deficiency against *Anna Miller.* (7) Allowing the second amendment to the complaint. (8) Making findings which failed to dispose of the issues in the case.

1 and 2. The finding of the court that the time of payment of the notes was not extended to or beyond the time when the action was begun is amply supported by the evidence. So is the finding that the premises were not the homestead of the mortgagors. This being so, on the showing made the case was a proper one for the appointment of a receiver.

3. The second mortgagee was made a party in the present suit. After plaintiff applied for a receiver and after notice of *lis pendens* had been filed, such second mortgagee commenced an action to foreclose his mortgage, the plaintiff

not being made a party thereto. Subsequently the mortgage was assigned to *Mrs. Bowers,* who proceeded to take judgment by default and to have a receiver appointed, without notice to the plaintiff, to collect the rents and profits of the mortgaged premises. The plaintiff, as the holder of the first lien on the mortgaged premises, was entitled to have the net proceeds of the receivership applied on her mortgage. The receiver appointed was made a party to the present action, and filed an answer in which he stated that he was "entirely indifferent as to whether he is to continue as receiver or not." The court had the right to remove the receiver already appointed and to name another in his stead, and in view of the allegation quoted from the answer of the receiver and the fact that he appealed from the judgment without first obtaining leave of court, we do not think he has any substantial ground on which to ask a reversal of the judgment. The other appellants have failed to show that they were injured by the appointment of a new receiver.

4. The mortgage expressly provided for the payment of interest on past-due instalments of interest and also for interest on amounts disbursed for insurance; so there was no error in making such allowances.

5. The items of costs allowed appear to be legal, and the evidence showed that the solicitor's fees provided for in the mortgage were reasonable.

6. The property mortgaged was owned jointly by the defendants *John Miller* and his wife, *Anna.* The mortgage was given to pay a prior mortgage on the same premises. The note was signed by both of the parties. Under these facts it was proper to provide for a deficiency judgment against *Anna Miller. Kriz v. Peege,* 119 Wis. 105, 95 N. W. 108; *Citizens L. & T. Co. v. Witte,* 116 Wis. 60, 92 N. W. 443. In the instant case the wife assisted in borrowing the money to preserve her own property, and charged that

property with the payment of the note which evidenced her own debt as well as the debt of her husband.

We do not think there is any merit in the seventh or eighth errors assigned.

*By the Court.*—Judgment affirmed.

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PENNSYLVANIA COAL & SUPPLY COMPANY, Respondent, vs. SCHMIDT, Appellant.

*November 21—December 9, 1913.*

***Estoppel: Burden of proof: Erroneous instruction: Appeal: Prejudicial error: Milwaukee civil court: New trial on appeal: Motion costs: Discretion.***

1. Where defendant in his answer sets up affirmative matter by way of estoppel, the burden of proof is upon him to establish such defense.
2. An erroneous instruction as to the burden of proof upon a material issue is sufficient cause for reversal where the finding of the jury on that issue is adverse to the party upon whom the burden is erroneously placed.
3. Under sub. 3, sec. 28, ch. 549, Laws of 1909, upon appeal from the civil court of Milwaukee county, if a new trial be ordered it should be had in the circuit court. The statute does not provide for the remanding of a case to the civil court for a new trial.
4. It was not an abuse of discretion, under sec. 2924, Stats., for the circuit court to allow $10 costs of motion when granting a new trial in a case appealed from the civil court of Milwaukee county; but it would be better not to impose costs upon defeated parties in such motions.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action begun in the civil court of Milwaukee county to recover $96.50, being balance due for coal sold and delivered to the defendant. The answer was a general denial. When plaintiff rested, the evidence showed that the coal

was sold to the defendant by the Mueller Fuel & Supply Company, acting as agent for the plaintiff. Defendant was then permitted to amend his answer, and he set up the defense that he bought the coal from the Mueller Fuel & Supply Company, not knowing that the plaintiff was the owner thereof, and that he had a setoff against the former; that plaintiff permitted said company to hold itself out as the owner of the coal, and that therefore it was estopped from maintaining the action.

The trial court submitted a special verdict of two questions. The first question was: Did the defendant at the time he purchased the coal in question know that the Mueller Fuel & Supply Company was acting as agent for plaintiff? The second question was: Ought the defendant in the exercise of ordinary care to have known that the Mueller Fuel & Supply Company was, at the time he purchased the coal in question, acting as agent of plaintiff? The court instructed the jury that the burden of proof as to both questions was upon the plaintiff, and the answer returned by the jury to each question was No. The plaintiff appealed to the circuit court, and it granted a new trial in said court on the ground that the civil court erred in charging the jury that the burden of proof as to the questions submitted was upon the plaintiff. From an order granting such new trial the defendant appealed.

*S. W. Dalberg,* for the appellant.

For the respondent the cause was submitted on a brief signed by *Nath. Pereles & Sons,* attorneys, and *Alex. L. Strouse* and *Daniel W. Sullivan,* of counsel.

VINJE, J. The defendant claims that the circuit court erred (1) in reversing the judgment; (2) in ordering a new trial by jury in the circuit court; and (3) in ordering defendant to pay $10 as costs of motion.

1. The defendant in his amended answer set up affirma-

tive matter by way of estoppel and the burden of proof was upon him to establish such defense. In *Wheeler & W. Mfg. Co. v. Monahan,* 63 Wis. 198, 23 N. W. 127, plaintiff relied upon an estoppel, and the court said: "The burden of proving the facts upon which the alleged estoppel is predicated was upon the plaintiff, and it has failed to make the proof." Page 203. To the same effect is *Delaney v. Canning,* 52 Wis. 266, 8 N. W. 897. An erroneous instruction as to the burden of proof upon a material issue is sufficient cause for reversal where the answer is adverse to the party upon whom the burden is erroneously placed. *Carle v. Nelson,* 145 Wis. 593, 130 N. W. 467. The judgment was therefore properly reversed and the order granting a new trial must be affirmed.

2. We are unable to find any foundation for the claim that the cause should have been remanded to the civil court for a new trial. Sub. 3, sec. 28, ch. 549, Laws of 1909, provides:

"Every judgment of said civil court shall be affirmed or modified and affirmed as so modified, by the circuit court, upon appeal, unless, by reason of manifest prejudicial error in the trial of the action in which such judgment was rendered, any party thereto has not had a fair trial thereof in the civil court; but in any such case of mistrial, where substantial justice cannot otherwise be done and the rights of the parties otherwise observed and protected, the judgment of the civil court therein shall be reversed, and the circuit court shall order the action tried in said circuit court in the same manner as if originally brought there."

Defendant argues that it is only in cases where the judgment of the civil court is modified and affirmed as so modified, and in case of a mistrial where substantial justice cannot otherwise be done and the rights of the parties otherwise observed and protected, that the circuit court may retain jurisdiction of the case and order the action to be tried in the circuit court in the same manner as if originally brought

there; and that there was no showing in this case that would warrant the circuit court in retaining jurisdiction, and that the case should have been remanded to the civil court for a new trial. It is evident that such construction cannot be given the statute, for it nowhere provides for the remanding of a case to the civil court for a new trial. The subdivision quoted prescribes when a new trial shall be granted, but, when granted upon any ground therein mentioned, the new trial must be had in the circuit court. The act does not contemplate successive appeals from the civil to the circuit court in the same action.

3. No abuse of discretion is perceived in granting the motion with $10 costs. Sec. 2924, Stats. 1911, provides that "Costs may be allowed on a motion, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute or directed to abide the event of the action." In our judgment, however, it would be better not to impose costs upon defeated parties in motions of this kind. They should be allowed to endeavor to sustain the judgment of the lower court without incurring the penalty of costs in the event they are unsuccessful.

*By the Court.*—Order affirmed.

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MONTREAL MINING COMPANY, Appellant, vs. THE STATE, Respondent.

*November 21—December 9, 1913.*

*Taxation: Income tax: Corporations: "Hearing and appeal" as to decision of tax commission: Statute construed: Illegal taxes: Remedies.*

1. Sec. 1087*m*—13, Stats. (providing that any corporation feeling aggrieved by the decision of the state tax commission regarding the assessment of its income "shall be granted the same rights of hearing and appeal as are now granted corporations

**assessed by said commission"), does not refer to an action to recover taxes illegally levied, but to a review before the tax commission of its preliminary decision as to the amount of income upon which the corporation must pay an income tax; being in effect the same right as the right "to appear and be heard" given to certain corporations, in respect to the assessment of their properties, by secs. 1215—10, 1218—11, 1222—11, 1222*bb*, 1222—53, 1222—63, 1222—73, Stats.**

**2. The time of the hearing under said sec. 1087*m*—13, Stats., is a matter of detail for which the commission may provide.**

**3. *It seems* that the remedies as to the cancellation of illegal taxes and the refund of moneys paid thereon which, by ch. 27, Laws of 1913 (sub. 4, sec. 1087*m*—22, Stats. 1913), are preserved to all persons paying income taxes, include the remedies given by sec. 1164, Stats. (Laws of 1913, ch. 478), by way of the filing of a claim and the commencement of an action against the town, city, or village to which the illegal taxes are paid.**

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Lines, Spooner, Ellis & Quarles,* attorneys, and *Goulder, Day, White, Garry & Duncan,* of counsel, and oral argument by *George Lines* and *Louis Quarles.*

For the respondent there was a brief by the *Attorney General,* and oral argument by *Walter Drew,* deputy attorney general.

WINSLOW, C. J. The plaintiff, a Wisconsin corporation, brings this action against the state in the circuit court for Dane county to recover an income tax levied against it for the year 1912, which is claimed to have been unlawfully levied. A general demurrer to the complaint was sustained, and the plaintiff appeals. The plaintiff's claim is that the action is authorized by sec. 1087*m*—13, Stats. 1911 (being one of the sections of the Income Tax Law), which provides as follows:

"Any corporation, joint stock company or association subject to assessment by the state tax commission, feeling aggrieved by the decision of said commission regarding the

assessment of its income, shall be granted the same rights of hearing and appeal as are now granted corporations assessed by said commission."

Unless this section authorizes the present action it is conceded that it cannot be maintained.

The section is not accurately worded, nor as clear in its meaning as might be wished, but we are well satisfied that it does not refer to an action to recover taxes illegally levied, but rather to a review before the tax commission of its preliminary decision as to the amount of income upon which the corporation must pay an income tax.

The three sections which immediately precede it provide for the determination and assessment of all incomes on or after January 1st in each year, and for the manner of making returns both by individuals and corporations, as well as for the penalties for fraudulent or incorrect returns. By sec. 1087*m*—10 it is provided that the assessment of corporations and joint-stock companies shall be made by the state tax commission and the assessment of persons by the county assessors. By sec. 1087*m*—11 it is provided that if it appears from evidence before the tax commission that any corporation has made incorrect or incomplete returns during the preceding three years, the tax commission may require of the corporation additional information and may make additions to the assessment for the current year to correct such previous errors, and shall give notice in writing of such increase to the corporation. Sec. 1087*m*—12 makes similar provisions with regard to the incomes of persons. Then follows sec. 1087*m*—13, already quoted. The six sections immediately following contain full and precise provisions regulating the appointment of a county board of review, before whom all complaints as to the assessment of personal incomes by county assessors can be made, and provide for an appeal from the decisions of that board of review to the state tax commission.

The position of the section in controversy is very persuasive as to its intent. It is placed exactly in the position where a provision for review of the assessment would naturally be placed. Unless it be construed to mean such a review, then no review of an assessment once made by the commission is provided for, although the legislature has been industriously careful to provide for two reviews of the assessment of personal incomes, and notwithstanding the further fact that as to certain increases made by the tax commission the commission is required to give notice to the corporation affected thereby that the increase has been made. This latter proceeding would seem to be entirely superfluous, if not absurd, if it were to be held that the corporation has no right to be heard concerning the matter.

Turning to other sections of the statute for assistance in construing the section under consideration, we find that the following classes of corporations were assessed by the commission for purposes of taxation at the time the Income Tax Law was passed, viz.: railroad, telegraph, sleeping-car, street railway, express, freight line, and equipment companies. Sec. 1212 to sec. 1222—71, inclusive, Stats. 1911. As to railroad, telegraph, and street railway corporations, we find it provided that the tax commission shall meet on the second Tuesday in November of each year to review the assessment of the property of such companies, and that any company assessed has the right to appear and "be heard" as to the value and assessment of its property and the tax to be levied thereon at that time. Secs. 1215—10, 1218—11, and 1222—11, Stats. 1911. As to the other companies named, they are given a right "to appear and be heard" in respect to the assessment to be made upon their properties at a meeting to be held on the third Wednesday of August in each year. Secs. 1222*bb*, 1222—53, 1222—63, 1222—73, Stats. 1911.

It is very plain to us that this is the right of "hearing

and appeal" which is granted to corporations assessed under the Income Tax Act. The time of the hearing is not fixed by the act, but that is evidently a matter of detail which is entirely within the power of the commission to provide for.

We arrive at this conclusion the more readily because of the fact that by ch. 27 of the Laws of 1913 the legislature has expressly preserved to all persons paying income taxes the same remedies as to the cancellation of illegal taxes and the refund of moneys paid thereon as are given in the laws relating to taxes upon personal property. We see no reason why the remedy given by sec. 1164, Stats., as amended by ch. 478, Laws of 1913, by way of the filing of a claim and the commencement of an action against the town, city, or village to which the illegal taxes are paid, is not included within the provisions of this law.

*By the Court.*—Order affirmed.

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DEWITT, Plaintiff in error, vs. THE STATE, Defendant in error.

*November 21—December 9, 1913.*

*Hawkers and peddlers: Licenses: Constitutional law: "Peddler" defined.*

1. Sec. 1570, Stats., which requires a hawker or peddler to obtain a license for which a fee must be paid, is a valid exercise of the police power. But, since the state may tax occupations, it is immaterial whether the exaction be referable to the police power or to the taxing power.
2. One who goes about from place to place, selling at retail, from house to house, goods which he carries with him, is a peddler, even though he may have a fixed business domicile and may carry with him only a part of his stock of goods.

ERROR to review a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is a writ of error to review a conviction of plaintiff in error of the offense of conducting the business of peddling without a license contrary to the statute, sec. 1570, Stats. 1911, which provides that "No person shall engage in or follow the business or occupation of a hawker or peddler within this state without having first obtained a license for that purpose as provided in sections 1570 to 1584*i*, inclusive."

The accused was in due form, charged under sec. 1570, Stats. 1911. The proof was to the effect that, during the time and within the territory alleged, the accused traveled from place to place with horses and wagon and selling as he could from house to house such spices, medicines, and other articles of merchandise as he carried. He obtained his stock under contract with a wholesaler who sold only by such methods. By the terms of the contract he was given the character of an exclusive agent for the seller within specified territory, but was in fact dealt with as a purchaser of the goods. He was required to pay for goods ordered substantially the same as in ordinary cases and depended for remuneration for his work upon selling such goods at an advance over the purchase price. He ordered the goods in quantities, stored them at his home, stocked his wagon there, and restocked it from time to time as needed. In due course he was found guilty as charged and judgment was rendered accordingly.

*Orlaf Anderson,* for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

MARSHALL, J. Counsel for plaintiff in error urges several reasons why the conviction complained of is wrong. No one of them involves a new question. It is said that sec. 1570, Stats., is unconstitutional; but this court has re-

peatedly passed upon similar legislation to the contrary. *Morrill v. State,* 38 Wis. 428; *Servonitz v. State,* 133 Wis. 231, 113 N. W. 277; *Monroe v. Endelman,* 150 Wis. 621, 138 N. W. 70.

It is next said plaintiff in error, because of having a fixed place of abode in this state and place for accumulating merchandise from which to stock his wagon from time to time, was not a peddler within the meaning of the statute; and we are favored with several definitions of the term "peddler" to support that view. Such term has no very technical meaning. Its ordinary popular meaning was incorporated into the law. That is so well known, a resort to learned discussions in respect to it in legal opinions, or to its peculiar ancient definition, is confusing rather than illuminating. A peddler is not necessarily "a deceitful fellow" satisfying the old ideas found in Jacob's Law Dictionary; nor is he, necessarily, a person having no fixed business domicile, nor one who carries his entire stock of merchandise with him. He may be a very honorable man and yet be a peddler. He may have a fixed business domicile and yet be a peddler, and he may be such regardless of whether he carries the whole or a part of his stock of goods with him. The essential thing is that he must do business by going about from place to place selling and delivering merchandise in a retail way to such individuals as he may be able to deal with. While doing that he is a peddler though he may, at the same time, have a business domicile to which he occasionally resorts. It is the method of disposing of the goods which makes the person a peddler. A peddler is simply one who peddles, and any one peddles who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him. That plaintiff in error satisfied all the requisites of that vocation, does not admit of a doubt.

It is next suggested that the statute is a taxing law in-

stead of an exercise of the police power. That it is within the latter field is ruled by *Morrill v. State,* 38 Wis. 428, and other cases. That since the state may tax occupations—impose excise taxes—it is immaterial whether the exaction be referable to the police power or to the taxing power. Thus there is no infirmity in the law in question from any reasonable point of view.

The foregoing covers all matters suggested which seem to be worthy of attention.

*By the Court.*—The judgment is affirmed.

# CASES DETERMINED

AT THE

# January Term, 1914.

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**Brunner**, Respondent, vs. **Minneapolis, St. Paul & Sault Ste. Marie Railway Company** and another, Appellants.

*September 19, 1913—January 13, 1914.*

***Railroads: Negligence: Fire on right of way: Burning of property: Contributory negligence: Reasonable anticipation: Degree of care required.***

1. One who knows that his property is exposed to destruction by an existing fire is bound to use all reasonable precautions to prevent its destruction, and if he fails to perform that duty is guilty of contributory negligence precluding a recovery against the person through whose negligence the fire started.
2. A fire which, through defendants' negligence, started on the railroad right of way, destroyed, more than fifty hours later, certain forest products owned by plaintiff which were piled on the opposite side of the track. The jury found that defendants ought reasonably to have anticipated, under all the circumstances, that the fire might probably reach and burn plaintiff's forest products as a natural and probable result. Upon evidence showing, among other things, that plaintiff, who lived only eighty rods from the track, was on the ground with one or two of his employees when the fire started; that they were there during the usual working hours most of the time until the fire reached his wood; that he knew everything about the facts and surrounding conditions that defendants' agents could or ought to have known; that he knew of the progress of the fire and that defendants had not sent any one to put it out; and that he had no reason for thinking that any of their agents in authority knew of it or intended to put it out if they did, it is *held* that he also ought reasonably to have anticipated that the fire might probably reach and burn his wood.

3. Upon the facts established by plaintiff's own evidence, and in view of the existing conditions known to him, it is *held*, contrary to a finding by the jury, that plaintiff did not use that degree of care and caution to prevent the destruction of his property that the law required him to exercise, and hence that he was guilty of contributory negligence precluding a recovery. KERWIN and SIEBECKER, JJ., dissent.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Reversed.*

This action was brought to recover damages for the burning of certain forest products piled for shipment by the plaintiff along and adjacent to a spur track of the Abbotsford & North Eastern Railway Company. It was alleged in the complaint that the defendant railway company owned and operated the railroad and spur track, and that its codefendant by its permission operated the locomotive which set the fire. The acts of negligence claimed were (1) failure to properly equip the locomotive so as to prevent the escape of sparks; (2) want of ordinary care in the operation of the locomotive; (3) failure to keep the right of way free from combustible material. The jury found all three acts of negligence and acquitted the plaintiff of contributory negligence. It also found in answer to the first question of the special verdict that the fire which eventually destroyed plaintiff's property was set on the right of way by an engine operated by the *Copper River Land Company* on the forenoon of May 4, 1911. The sixth question of the special verdict was as follows:

"(6) If you answer the first question 'Yes,' then ought the defendants to have reasonably anticipated, under all the circumstances, that said fire might probably reach and burn plaintiff's forest products as a natural and probable result? *A.* Yes."

The court rendered judgment in favor of the plaintiff for the value of the material destroyed as found by the jury, and the defendants appeal from the judgment.

*W. A. Hayes,* for the appellant *Minneapolis, St. Paul & Sault Ste. Marie Railway Company.*

For the appellant *Copper River Land Company* there were briefs by *Lines, Spooner, Ellis & Quarles,* and oral argument by *George Lines.*

*Emery W. Crosby,* attorney, and *R. J. MacBride,* of counsel, for the respondent.

The following opinion was filed October 7, 1913:

BARNES, J. The appellants insist that the judgment is erroneous and should be reversed on the following grounds: (1) There was no evidence showing or tending to show that the defendant railway company either owned or operated the railroad or spur track in question; (2) the plaintiff assumed the hazard which caused the destruction of his property; (3) the plaintiff was a trespasser or at best a mere licensee, toward whom the defendants owed no duty except to refrain from acts wilfully injurious; and (4) the plaintiff was guilty of contributory negligence.

The conclusion reached on the question of contributory negligence obviates the necessity of considering any of the other assignments of error.

The property destroyed consisted of hemlock and basswood bolts and kiln wood. The amount found by the jury was 1,400 cords. About 300 cords of the kiln wood had been piled along the spur track for more than a year before the fire. This wood was fuzzy and rotten and extremely dry and inflammable, as much so as tobacco or cotton, according to plaintiff's evidence. The rest of the wood had been hauled during the winter preceding the fire. The fire that destroyed the wood was set by a passing locomotive between 10 and 11 o'clock on the forenoon of May 4, 1911. The weather was and had been dry for some time before the fire. The plaintiff owned the northeast quarter of section 34, township number 29 north, of range 2 east, in Marathon county. The railroad ran through this land in a northeasterly and

southwesterly direction. The spur track in question was on the southwest quarter of the northeast quarter of the aforesaid section and on the northerly side of the main track. The fire caught on the right of way on the southerly side of the track and opposite where the wood was piled. There was no wood piled on the south side. The plaintiff and one of his employees were at work four or five hundred feet from where the wood was piled when the engine passed which the jury found set the fire, and they discovered the fire almost immediately after the train passed. The plaintiff's land on the south side of the track was cut over and there was considerable *débris* thereon, and the railroad right of way was also badly littered with the *débris* usually found after forest products have been removed and the land has not been cleared up. There was a moderately brisk northwesterly wind on the day on which the fire was set, as well as on the day following. The wind went down toward evening on the 4th and 5th of May. On May 6th the wind changed and blew more strongly than on the preceding days and from the southwest and drove the fire across the track and into the plaintiff's wood.

The undisputed evidence tends to establish some facts which it is difficult for any one who has ever seen a forest fire, or for any one who hasn't for that matter, to understand and harmonize. It is undisputed that it had been very dry for some time before the fire; that there was a brisk wind blowing; that there were old logs, stumps, tree tops, small balsam trees, and grass and weeds in abundance in the path of the fire, and yet on the day it started it only burned over a strip about 100 feet wide and from 100 to 200 feet long. On the second day the area burned over was no greater, and on the third day the fire spread over a somewhat larger territory. The fire spread very little during either night. It is a fair conclusion to draw from the evidence that during the first forty-five hours that elapsed after the fire started,

it did not run over to exceed what would be one half of an ordinary sized block in a city or village.

The jury found that the defendants ought reasonably to have anticipated under all the circumstances that the fire set might probably reach and burn the plaintiff's forest products as a natural and probable result. If the defendants were bound to anticipate the burning of plaintiff's property, then assuredly the plaintiff was bound to anticipate that it would be burned as a natural and probable result of the fire. The plaintiff's conduct after he discovered the fire must be judged in the light of the anticipation that the fire would probably reach and destroy his property. He lived only eighty rods from the spur track. He had been working around there on and off for a couple of years, and knew the condition of the right of way as well as of his own land adjacent thereto. He was practically on the ground when the fire started, working with one of his employees. He testified that immediately after the train passed he saw the blaze that set the fire. Another of his employees was on the ground in the afternoon, but apparently took no very active part in putting out the fire; at least he carried no water. Plaintiff knew of its progress during the fifty-odd hours that elapsed between the time it started and the time it reached his wood. As owner of the property exposed to destruction and knowing of the existence of the fire, he was bound to use all reasonable precautions to prevent its destruction, and if he failed to perform the duty which the law enjoined on him in this regard, he was guilty of contributory negligence, which in law precludes a recovery. *Kellogg v. C. & N. W. R. Co.* 26 Wis. 223; *Mills v. C., M. & St. P. R. Co.* 76 Wis. 422, 45 N. W. 225; *Austin v. C., M. & St. P. R. Co.* 93 Wis. 496, 67 N. W. 1129; *Gibbons v. Wis. Valley R. Co.* 62 Wis. 546, 22 N. W. 533.

Does the undisputed evidence show that the plaintiff was guilty of contributory negligence? There is in fact no dis-

pute in the evidence upon the question. It was given by the plaintiff and his brother-in-law. The circuit judge, in his opinion on the motion for judgment by defendants after verdict, said that he had grave doubt on this question, but concluded that negligence on plaintiff's part was not so clearly established that reasonable minds might not differ on the subject.

It might be here remarked that if this fire had been set in the plaintiff's wood without any other act of negligence on the part of the railway company than that of allowing the material to remain on its right of way the length of time which it did, and the fire communicated to the property of a third person, the defendant railway company would be liable for the resulting damages under the doctrine of *Theresa Village Mut. F. Ins. Co. v. Wis. Cent. R. Co.* 144 Wis. 321, 128 N. W. 103. The case under consideration presents a more aggravated situation than did the *Theresa Case.* The right of way and land adjacent thereto contained a lot of combustible material. The wood was of the same character in a large part, and it was permitted to remain on the right of way nearly a year longer. The amount of material stored was considerably larger. If it would be negligence for the railway company to permit the wood to remain, it would certainly be negligence for the owner to do so. It was the duty of the plaintiff, under the decision cited, to have shipped his wood before the fire. Had he done so, it would not have burned. But, assuming that this act of negligence would not be a defense against negligence on the part of the defendants, we think the evidence failed to show that the plaintiff used reasonable diligence to put out a fire that he had reason to anticipate would probably destroy his property if not brought under control.

In the first place, it seems well nigh incredible that a woods fire which was only able to cover a space 100 feet wide by 100 to 200 feet in length from before 11 o'clock in the

morning until 6 o'clock in the evening of May 4th, occurring during a dry time and fanned by a wind, could not, with a reasonable endeavor on the part of the plaintiff and his employees, have been prevented from spreading further. What is true of May 4th is just as true of May 5th and the early part of May 6th.

In the next place, when plaintiff found he could not control the fire, if he did so find, he neither notified the railway company nor his neighbors, nor called for any assistance from his neighbors until the fire reached his wood on May 6th. Then in less than half an hour he got fifteen or twenty of them to come to his assistance and they succeeded in saving a part of the wood. He had a number of neighbors living near him with whom he had telephone connections, and he could also reach the agent of the railway company at Abbotsford, four miles distant, in the same manner. It was the custom of the railway company to send men to put out fires that were running along its right of way, when notified of their existence. Although he permitted a lot of highly inflammable material to remain on the badly littered up right of way for considerably more than a year, he never even took the precaution to keep a few barrels of water on the premises that would be handy for use in an emergency. He abandoned the fire entirely on the night of May 4th and also on the night following. The wind was down on both nights and the fire spread very little. It at least seems incredible that the fire could not be put out on either night in the little patch where it was working, had any reasonable effort been used. It is hardly ordinary care for a man to sit down after 6 o'clock and do nothing to prevent a fire from destroying his property, unless some reasonable excuse is offered for so doing. With the assistance of his men, it is obvious that this fire could have been put out or its spread prevented on either night. If his men refused to work, and his brother-in-law hardly would have done so, he might call

upon his neighbors, but he did not even work himself. The Big Eau Plaine river was within twenty or thirty rods of the wood yard, and there was also a spring not to exceed twenty or thirty rods away. There was not a shovelful of dirt thrown on the fire and no attempt made to throw up any embankment or dig any trench around it, although the testimony of the plaintiff showed that the shovel was an implement commonly used to fight forest fires by throwing up dirt and stamping out the fire. What the plaintiff and his men did do was to carry some water from the spring for an hour or two on the first day and to brush away some leaves from the path of the fire on this and the succeeding days. But even this latter work they did not keep up. Part of the time they spend in simply watching the fire and part of the time in peeling the bark from the basswood bolts and doing other work around the wood piles that had no connection with the fire whatever.

Concerning his efforts to put out the fire on May 4th, the plaintiff, among other things, testified that he noticed it as soon as the train had gone by; that he was about 400 or 500 feet from the track; Frank Davis was with him; that they rushed down and saw it was burning pretty good and that he rushed up to his house and got some pails and they carried water from the spring and tried to put it out and couldn't; that he did not know how many pails of water they used on it. They brought water there quite a while until the fire ran away from them to the south. It might be here remarked that the utmost extent to which the fire ran on May 4th did not exceed 200 feet in length by 100 feet in width. He further testified:

"Q. Did you try to put it out with anything else besides pails of water? A. No. Q. What else did you do that day to try to put it out? A. We didn't do much of anything. We tried to put it out with water and we couldn't do it. Q. How long did you keep up your efforts to put it out with water? A. We worked about an hour or two. Q. After that

what did you do? A. Well, we kind of kept watch of it. Tried to keep it from running further if we could. Q. What did you do to keep it from running? A. We kind of scratched the leaves away. Tried to make a track so that it could not get across. Q. Across what? A. Across the leaves. Q. How far did the fire go that day? A. It must have went a couple of hundred feet, something like that. Q. Toward the south? A. Yes, and it spread some too. Q. How wide did it spread? A. Might have spread a hundred feet. Q. What was there on this ground that the fire went over that day? A. There was brush and old logs—grass."

Continuing, the witness said:

"We stayed there fighting it until about 6 o'clock. We went to dinner that day. Davis and I changed off. When it came 6 o'clock he and I left it. I went down after supper and looked at it, but Davis didn't. It was still burning after supper over this piece of land. Some places it was burning in logs and rubbish and stumps laying all over. I didn't leave anybody there to watch it that night. Jacobi was there in the afternoon. He did not bring pails of water. Didn't do anything after about 6 o'clock."

Referring to the efforts made to put out or control the fire on the following day, the plaintiff testified that he got there in the morning about 7 o'clock.

"Q. What did you try to do then? A. Couldn't do much of anything. Q. What did you try to do? A. Fire was all over. Hard chance to put it out. Q. What did you try to do? A. Well, we couldn't do much of anything at all. Q. Did you try to do anything? A. Sure, we tried. Q. What did you try to do? A. We tried to scratch the leaves, you know, and get a track, and tried to keep the fire from running across it, but it would get across. Q. This was still burning down toward the south, was it? A. Yes. Q. When you got there on the morning of the 5th had it spread much during the night? A. It spread some, but it didn't spread as much as it did during the day. Q. Who did you have there helping you on the 5th? A. Davis and Jacobi. Q. Did you work there all that day? A. No.

Q. How long did you work? A. We worked so long as we see we couldn't hold the fire from going any further. Q. How long was that? A. It was maybe a couple of hours—three hours—four hours. Q. You worked there two or three or four hours that day? A. Yes. Q. And then you didn't work any more? A. No, we kept watch of it so that if there was sparks flying we would keep that out. Q. How far did it burn that day? A. It must have burned a couple of hundred feet more. Q. So that would make in the neighborhood of 400 feet all together? A. Yes, three or four hundred feet."

The witness further testified that they left the fire at 6 o'clock that evening, and that he went down after supper and looked at it and that it was still burning; that there must have been a couple of hundred feet that was on fire, the way it was running. There wasn't as much flame as during the daytime. Plaintiff testified that on the morning of the 6th he got down there at 7 o'clock. The fire was not burning so hard; that it had gone down during the night; that he made an effort to put it out on the morning of the 6th.

"Q. What did you do? A. We tried to surround it the way we did the other day. Q. Who was there to help you? A. Edwin Jacobi. Q. Davis too? A. Yes, Davis was there too. Q. You say you tried to surround it. What did you do? A. We tried to scratch a track the way I told you before and scratch the leaves away and try to keep it from running across. Some time after, the wind came up and it ran right across and got away just the same. I did not notify the railroad men that the fire was burning. They had employees running by there. I thought they saw the fire. I had a telephone in our house at that time connected with Abbotsford. I knew there were officers of the railway company at Abbotsford. I did not ask anybody except Davis and Jacobi to help me fight the fire while it was burning across the track—didn't until it got into my wood."

The witness further testified that the wind was blowing from the southwest on the morning of the 6th when he got

up. Went down to the fire between 7 and 8 o'clock. Fire had sort of died down during the night. The fire was burning to the west side of the burned-over place on the 6th. Came up close to the previous burnings—way up to it all the way up to the track. The fire reached the track about 1 or 2 o'clock on the 6th. I was down there all the time. Edwin Jacobi and Frank Davis were with me right along. Of course we changed off to get our dinner. We went to dinner that day the same as other days, we changed off.

When the fire got across the track and into the wood the witness "hollered" for help and got fifteen or twenty men there in a very short time. The amount burned on the 6th was considerably more than on the 4th. The fire burned faster. Started all over on the wood, sparks flying over there, and it burned on top and on the sides and all over. Kiln wood was the nearest to the track. It was pretty dry. This light, loose, splintery, fuzzy stuff, a pretty small spark will set to going—start almost as quickly as tobacco or cotton.

Edwin Jacobi, a brother-in-law of the plaintiff, testified to substantially the same state of facts as the plaintiff. He said: We tried the best we could to put it out. I worked there all afternoon of the 4th. On the 5th I was there early in the morning. We worked there pretty near all day up to 4 o'clock; we could not check it then. On the 6th we was down there again and tried it, but could not succeed in checking it. I was there when the wood yard burned. The wind was blowing from the southwest, and the fire came around, followed the outer edge of it. And as it came near the landing it spread out. It was somewhere near 2 o'clock before the fire got into the yard on the 6th.

"Q. Didn't you also work in the wood yard in the forenoon of the 6th? A. No. Q. Peeling bolts and piling wood? A. About two or three hours of it, early in the morning before the wind arose. Q. And Davis worked some there also,

didn't he? A. Not with me. Q. But elsewhere in the yard? A. He worked a little further up around the yard, not in the yard. Q. What was he doing? A. Cleaning up also. Q. And piling also? A. Yes, sir. Davis did not do any peeling. While I worked there peeling and piling and cleaning I would look over at the fire occasionally and then peel and pile and look over at the fire again."

Witness also testified that he worked in the wood yard on and off during May 5th, but did not do any work therein on the afternoon of May 4th.

The condition, then, on the morning of May 6th was this: The wind had changed and increased and was blowing so as to carry the fire toward plaintiff's wood; the wood was dry and inflammable; the ground was dry and littered with dead tops, brush, and grass, and at the utmost the fire was not more than 400 feet away from the wood. It was not only probable but inevitable that the fire would reach the wood, unless it rained or the wind changed or there was some efficient work done to stop it. There is no claim that it looked like rain and no reason to suppose that the wind would suddenly change. Yet with this situation before him, plaintiff not only failed to call for any help, but he kept his two employees, Davis and Jacobi, at their usual work in the wood yard for at least two or three hours in the morning. It is true Jacobi says that this occurred before the wind came up, but plaintiff said the wind had shifted during the night and was blowing from the southwest in the morning when he got up, but that it got stronger during the day. We do not think there was any room for the jury to draw the inference from this testimony that the plaintiff used that degree of diligence in attempting to control this fire that an ordinarily prudent person would use who had every reason to anticipate and who in fact did anticipate that his property would in all probability be destroyed by fire unless its spread was prevented. No water was used after the first day. What work was done thereafter consisted in putting out sparks and brushing away

leaves from the path of the fire. The fire had been driven back to the track and within a few feet of the plaintiff's wood about noon of the 6th. The plaintiff and his employees changed off and went to dinner as usual, but the fire did not reach the wood until between 1 and 2 o'clock, and it was not until then that help was called for. Until this fire got into the plaintiff's wood it was a diminutive affair. This is apparent from the small area which it covered and the character of the stuff on which it fed. It is something of a tax on one's credulity to believe that its spread could not be prevented day or night by the plaintiff and his employees, had they made an intelligent and determined effort to do so. The attempts to stop this fire, at least after the first day, were desultory and feeble and no attempt whatever was made to secure reinforcements. The witness DeLapp testified that plaintiff gave him as a reason for not getting help that he thought from the condition of the wind he would "let it burn and do away with the rubbish on that side of the track." Plaintiff did not deny making this statement, except to this extent: He said he did not remember of having made the statement and did not think he made it.

We hold that on the facts which are established by the evidence of the plaintiff without dispute, and in view of the existing conditions which were known to the plaintiff, he did not exercise that degree of care and caution to prevent the destruction of his property that the law required him to exercise, and that he has no right of recovery in this action.

*By the Court.*—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

The following dissenting opinions were filed October 17, 1913:

KERWIN, J. (*dissenting*). The jury found that the plaintiff was not guilty of contributory negligence, and the court

sustained that finding in a very ablé opinion in which he carefully considers the case, discussing all the points made by appellants and resolving them in favor of the plaintiff. This court has repeatedly held that if there is any credible evidence to support the verdict it cannot be disturbed, and that the judgment of the trial court sustaining the verdict should not be set aside unless clearly wrong. *Nolan v. Kroening,* 130 Wis. 79, 109 N. W. 963; *Hoveland v. Nat. B. Works,* 134 Wis. 342, 114 N. W. 795; *Kroger v. Cumberland F. P. Co.* 145 Wis. 433, 130 N. W. 513; *Ritter v. C., M. & St. P. R. Co.* 128 Wis. 276, 106 N. W. 1103; *Lam Yee v. State,* 132 Wis. 527, 112 N. W. 425; *Clemons v. C., St. P., M. & O. R. Co.* 137 Wis. 387, 119 N. W. 102; *Sparks v. Wis. Cent. R. Co.* 139 Wis. 108, 120 N. W. 858; *Lind v. Uniform S. & P. Co.* 140 Wis. 183, 120 N. W. 839; *Fitzpatrick v. Lake Superior T. & T. R. Co.* 142 Wis. 65, 124 N. W. 1054; *Rogers v. Brown,* 143 Wis. 472, 128 N. W. 64; *White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 133 N. W. 148; *Slam v. Lake Superior T. & T. R. Co.* 152 Wis. 426, 140 N. W. 30.

After a careful examination of the record I am unable to say that there is no credible evidence to support the verdict nor that the judgment of the court below is clearly wrong. I cannot agree to the proposition stated in the majority opinion to the effect that because the jury found that the defendant ought "reasonably to have anticipated under all the circumstances that said fire might probably reach and burn the plaintiff's forest products as a natural and probable result," the plaintiff was bound to anticipate that the property would be burned as a natural and probable result of the fire. I do not regard the analogy perfect. A different relation exists between plaintiff and defendant on the element of anticipation. The jury would be entitled to find reasonable anticipation on the part of defendant and not on the part of plaintiff under the circumstances of the case. The defendant was bound to keep its right of way free from combustible matter

and protect property from fires originating upon its right of way through its negligence or failure to perform its duty. In the exercise of ordinary care on his part the plaintiff had a right to presume that the defendant would perform its duty, and conduct its business accordingly. Beach, Contrib. Neg. sec. 237. The finding of anticipation by defendant for the reasons stated and others, perhaps, does not necessarily charge the plaintiff with the element of anticipation.

The main question, however, upon which the majority opinion turns is the alleged contributory negligence of the plaintiff. The learned trial judge found trouble with this question, and the fact that he did is evidence that he very carefully considered it. I think the evidence ample to warrant the jury in finding that the plaintiff was not guilty of contributory negligence. During May 4th and 5th there was little, if any, danger of the fire reaching the plaintiff's property. It started on the south side of the right of way and continued to run in a southerly direction away from plaintiff's property. The defendant's employees had knowledge of the fire, and the plaintiff had a right to believe they would assist in putting it out, if it became dangerous, without being requested. The course of the fire during the 4th and 5th was toward the river and away from the wood yard. The plaintiff and two others did considerable work during this time in trying to put it out, but failed, although doubtless they considerably retarded its progress, since it burned over a very small territory during the 4th and 5th. True, the evidence shows that plaintiff did not work fighting the fire on the nights of the 4th and 5th, but he did return after supper and kept watch of it for a time until he was satisfied that it would do no harm during the night. It is entirely probable that plaintiff could not fight a forest fire for two days and two nights in succession without rest, and his belief that it was in such condition that it could be left with safety seems to have been verified by the fact that the fire made little progress

during either night and reached no danger point. Whether a fire is sufficiently subdued so that it will smoulder and gradually die out is peculiarly a matter of judgment upon which the plaintiff could be mistaken without being negligent.

It is said in the majority opinion that the plaintiff did not work effectually, that he did not shovel dirt, but merely scratched off leaves and made tracks around the fire. Whether the work done was effectual work or the proper way to fight the fire, a jury of the county and the judge of the circuit were as well, if not better, able to judge than this court. It is quite obvious that the proper or best manner of fighting a fire may vary according to circumstances. A prairie fire could doubtless be most effectually fought by plowing around it or surrounding it by a trench. But a forest fire and a fire in a "slashing" among the tree tops, brush piles, small undergrowth of timber, a mass of roots, brush, and shrubbery, are quite different propositions, and the progress must be stayed in a different manner. It is often a proper way to fight fire with fire—a back fire. It is a common thing in fighting fire to build a fire ahead of the destructive fire, burn off the combustible matter, and thus stay the progress of the large fire. The defendant introduced some evidence to the effect that plaintiff said that he would let the fire burn and clear off the rubbish after it started on the 4th. I think the jury would be well warranted in finding that this was not negligence even if the plaintiff did so. If the defendant had cleared its right of way at the place in question on the 4th after the fire started, either by clearing off the rubbish or burning it while the wind was from the north, no injury would have been occasioned to plaintiff. The fact that the plaintiff and his helpers did not use shovels in fighting the fire was not negligence under the circumstances of the case. Conditions were such that shovels could not be used efficiently. Digging ahead of a fire in "slashings" among second growth of timber, brush,

and roots obviously would not be effectual. Moreover, it appears from the evidence that the fire burned with considerable fury and that shoveling or digging ahead of it to the extent that could be done would be wholly unavailing. This is evident from the fact that the fire jumped the railroad track when it reached it on the 6th and started fresh fires in the wood piles.

I think it was for the jury to say whether the manner of fighting the fire and the means used, under all the circumstances, were the exercise of ordinary care on the part of the plaintiff. The evidence shows that plaintiff and his employees tried to put out the fire with water and could not do so; that they scratched away the leaves and made tracks around the fire. This evidence tends to show that they tried to surround it or stay its progress by making a track cleared of all combustible material so that when it reached this track it would go no further. Could not the jury find that it was ordinary care to fight the fire, under the circumstances, in the manner the evidence shows they did fight it?

The evidence tends to show that the fire did not make great progress on the 4th and 5th and that it was kept pretty well under control, but that plaintiff and his help could not extinguish it. Its course was toward the river, which was not far away, at which it would spend its force. On the morning of the 6th, however, the wind changed and drove it back toward plaintiff's property. The plaintiff and his employees worked at it in the forenoon and tried to surround it the same as they did on the previous days, but were unable to stay its progress, whereupon they called the neighbors and collected fifteen or twenty men who appeared with pails and aided in trying to extinguish the fire, but failed. The question is not whether it was possible to fully extinguish the fire by collecting a large force before the 6th, but whether it was ordinary care on the part of the plaintiff to fight the fire as he

did when there was no immediate danger, and when he thought the railroad employees knew of the fire and would assist in putting it out if there was danger.

Even on the morning of the 6th the fire was not dangerous. It had died out during the night of the 5th, but the wind rose during the forenoon of the 6th, got stronger during the day, and the fire reached the track about 1 or 2 o'clock p. m. of the 6th. During the nights of the 4th and 5th the evidence shows that the fire was confined largely to logs and old stumps where it had caught; it would stick in the old stumps; the other stuff had pretty well burned up, but kept burning some in the stumps. So it appears that plaintiff and his help kept the fire pretty well under control on the 4th and 5th. One witness testified respecting work on the 4th:

"Q. Did you do anything that afternoon with *Mr. Brunner* to put out this fire? A. Yes, I did. Q. Will you tell the court and jury what you did there? A. We first tried to put it out with some water and we didn't succeed very well with that, so we went to work where the largest blazes were of the fire. We scraped the leaves away to keep it from running, and then we couldn't stop it while the wind was blowing so hard and throwed the sparks over that, and all we could do was to surround it with water again and put out these little sparks that would start up that we could control. But that was to no effect, the wind was too strong. It was too strong. It was burning all over and there were tops of hemlock trees fell over, and balsams. They give a pretty good blaze, and when it got in there we could not control it. We tried the best we could to put it out. Q. Did you work there all the afternoon of the 4th? A. Yes, sir. Q. How about the 5th? A. I was there early in the morning. Q. Did you work around this fire during all the time on the 5th? A. We worked there pretty near all day up to 4 o'clock; we could not check it then."

There is evidence that the wind changed during the night or morning of the 6th and got strong during the day and that the fire turned and burned another strip about 200 feet

wide back to the track. This strip was about 400 feet long, so that the amount burned on the 6th was considerably more than that burned on the 4th. This strip burned on the 6th was covered with combustible matter on the right of way, and when the fire reached the right of way up to the track the sparks flew across and caught in plaintiff's wood. The sparks set fire to the wood all over. "Sparks flying over there, and it burned on top and it burned on the sides and all over."

The evidence not only shows that the fire started on the right of way on the 4th and burned away from the track the 4th and 5th, but that then the wind changed and it burned a new track back and into the rubbish and combustible material on the right of way, and when it burned up to the track it threw sparks across into plaintiff's wood piles and destroyed them. The evidence is sufficient to warrant the jury in finding that the defendant's employees knew of the fire on the 4th and 5th and knew that plaintiff had a right to believe that defendant would clear its right of way of combustible material and prevent the fire from running upon and over its right of way if it returned. There is evidence that the employees of defendant went over the track at the point in question at least twice a day during the 4th, 5th, and 6th and knew of the fire; that the right of way was covered with rubbish and other combustible material. The law requires the defendant to keep its track clean. The plaintiff had a right to presume that after the fire started on the 4th the defendant would guard against damage which might be occasioned by the accumulation of combustible material on its right of way. All of these circumstances must be taken into account in determining whether plaintiff was guilty of contributory negligence. The plaintiff was not bound to call upon defendant to perform its duty. He with the help he had was quite active in fighting the fire and kept

it fairly well subdued to the extent that it did not spread in any dangerous direction until the forenoon of the 6th, when a strong wind drove it again upon the right of way and into a mass of rubbish and combustible material which should not have been there.

Some of the evidence is set out in the majority opinion, but of course it is difficult to get a very accurate idea from fragments of what the whole evidence tends to prove. The evidence shows that the plaintiff's wood was piled on the north side of the track and that the fire started on the south side; part of the wood was piled on the right of way and part on the plaintiff's land; the wood was placed in this position so as to be convenient to load on cars for shipment; the fire started in a pile of rubbish on the right of way May 4th. The plaintiff testified that after the train passed on the 4th of May the fire started on the right of way and he rushed to it and saw that he could not do anything without water, so he went for a couple of pails, but before he got back the fire had spread and it was impossible to put it out; that it ran off onto his land from the right of way and burned down several hundred feet; that it was awfully dry at that time; that there was a spring twenty or thirty rods from the fire from which he carried water, but could not put it out; that the wind was blowing a good breeze; that it was awfully easy for the fire to start in the rubbish on the right of way, and when it did start it burned "awful hard right away;" that plaintiff had a man or two with him helping him fight the fire on the 4th and they worked until 6 o'clock or a little after; that the next morning the fire was still burning but not blazing so hard—the wind had gone down a little; that the fire kept burning on the 5th; that plaintiff could not put it out on the 4th or 5th, but he had his men keep watch of it and tried to keep it from running farther; that they made tracks around it so it could not get across; that at noon plaintiff and his men changed off to go to dinner

so as to leave one watching it, and plaintiff went down after supper and watched it; that the right of way extended through plaintiff's land, so that he owned land on both sides of the track. Plaintiff produced the following evidence:

"Q. Will you explain to this jury what this pile of rubbish that you say this fire started in was? A. It was a pile of old ties and old bark and all stuff they had picked up and throwed up on a pile and then grass had growed up—high weeds,—and it was awful easy for the fire to start. When it did start it burned awful hard right away. It was awful dry. Q. What condition was this right of way in right around next to your log piles as to being cleared up or whether there was any refuse or anything on there? A. It was in bad shape. Q. Tell the jury. A. It was grass and weeds and small brush and old logs and ties and everything lying along the whole right of way there." . . .

"Q. You stayed there how long that afternoon—the afternoon of the 4th? A. I stayed there until 6 o'clock or maybe a little after. Q. And then the fire was burning how far away from your wood yard at that time? A. It must have been from two to three hundred feet from the wood yard at that time. Q. How was it the next morning when you came down there? A. It was still burning. It was not blazing so hard the next morning. The wind had gone down a little bit, but after a little bit the wind rose a little bit. Q. On the morning of the 5th what direction was the wind? A. In the north yet. Q. Did that fire keep on burning? A. Yes, kept on burning all day the 5th. Q. Did it burn as much on the 5th as it did on the 4th? A. Yes, it burned more on the 5th than it did on the 4th. Q. What happened on the morning of the 6th? A. The wind had changed to the southwest and it kept blowing this fire back toward my land, and of course during the day the wind got pretty strong and after dinner between 1 and 2 o'clock, why it came so fast we could not keep it back and it got across the track into my wood yard and we could not put that out. Q. Who was there helping you at the time the wood yard burned? A. There was Edwin Jacobi right there when the wood yard started to burn. He was right there helping me fight the fire. Of course after it got into my wood I run up

to the house and got some more pails, and I run up on the road and I hollered 'fire' as loud as I could and rushed back and some more of my neighbors came down with some more pails. But it was impossible for us to put it out, and within a short time the fire got so hot we could not do anything. All we could do was to surround it and keep it from running my whole land. Wherever the sparks would fly we would put that out. Q. You watched this fire all the day of the 5th with a man? A. Yes, I did. Q. And also the morning of the 6th? A. Yes, sir." . . .

"Q. On the 4th of May, the first day of the fire, who was with you? A. Frank Davis. Q. I mean helping to put it out. A. Yes, he was there at that time in the morning. In the afternoon Edwin Jacobi was there too." . . .

"Q. On the 5th who was there with you during the fire? A. Frank Davis and Edwin Jacobi. Q. Anybody else? A. No. Q. The 6th, the day they destroyed your wood yard, what other people were there? A. After the yard had caught fire there was quite a number of people there—the neighbors. Of course before the yard had caught fire there was me and Edwin Jacobi and this Davis. Q. That was before it crossed the railroad track from the south? A. Yes. Q. You had no wood on the south side of the track? A. No." . . .

"Q. How long did you keep up your efforts to put it out with water? A. We worked about an hour or two. Q. After that what did you do? A. Well, we kind of kept watch of it. Tried to keep it from running further if we could. Q. What did you do to keep it from running? A. We kind of scratched the leaves away. Tried to make a track so that it could not get across." . . . .

"Q. Did you make any effort to put it out on the morning of the 6th? A. Yes, sir. Q. What did you do? A. We tried to surround it the way we did the other day. Q. Who was there to help you? A. Edwin Jacobi. Q. Davis too? A. Yes, Davis was there too. Q. You say you tried to surround it. What did you do? A. We tried to scratch a track the way I told you before and scratch the leaves away and try to keep it from running across. Some time after the wind came up and it ran right across and got away just the same." . . .

"Q. About how wide a strip did it burn from the south

side of the right of way down toward the river? A. It burned maybe 100 feet or so when it went down. When it came back it burned another strip maybe the same width, maybe a little wider. Q. Did it go clear to the river? A. No, it didn't. Q. What stopped it? A. There was a kind of old clearing over in there. Old marsh near the river. Q. How long was it before it got down to that point near the river where it stopped? A. About a day and half or so. Q. And along about the evening of the 5th? A. Yes." . . .

"Q. On the morning of the 6th the fire turned around and again came back toward the track, did it? A. Yes, it did. Q. And gradually worked another strip back? A. Yes. Q. And about how wide would you say the strip was which was burned back on the forenoon of the 6th? A. It must have been maybe 200 feet wide. Q. And about how long? About 400 feet? A. Yes, something like that. Q. So that the amount burned on the 6th was considerable more than that burned on the 4th? A. Yes. Q. Burned faster? A. Yes. Q. Or was the material a little drier? A. Well, it wasn't much drier, but it was a little more old rubbish and grass, I suppose, and the wind was a good deal stronger, so it drove it through fast. Q. Did this brush, rubbish, old logs, stumps, and tree tops and the like cover all of that strip burned on the 6th? A. Yes. Q. Clear up to the right of way? A. Yes. Q. And when it got up to the right of way these sparks began to fly over from time to time? A. Yes. Of course the right of way was all the same kind of rubbish and it burned over on that. It never stopped until it got right to the track. Q. Where did the fire start on the wood? On the top or down on the ground? A. It started all over. Sparks flying over there, and it burned on top and it burned on the sides and all over."

Speaking of the fire on the 6th before it caught the wood the witness said:

"Q. When things got to that point you and Davis were still alone? A. No, Jacobi was there. Q. You and Jacobi and Davis? A. Yes, sir. Q. No other help had yet— A. No. Q. And then you skipped quickly for help, did you? A. Yes. Q. How long after you set out for help was it be-

fore help arrived? A. It was not more than about fifteen or twenty minutes. Q. And then the number of those coming greatly increased? A. Yes. Q. What did they bring as weapons of war? A. Brought pails. Q. And shovels? A. No, I guess they didn't any of them have shovels. Q. Each brought pails with him? A. I guess they didn't all bring pails over. Q. And they carried water from the river? A. They had a spring there they got water out of. Q. During the night of the 4th and 5th was the fire pretty largely confined to logs and old stumps in which it had caught? A. Yes, old stumps and old logs burning."

As to extinguishing the fire on the 6th a witness testified: "Q. What did you do to try to extinguish this fire after you got down there? A. Carrying water and throwing piles apart."

There is also evidence that the fire burned in the shape of a horse shoe, starting at one heel and burning toward the river to the toe and then back to the other heel at the railroad track, and that it was 600 or 700 feet from where the fire started to where it stopped near the river bank.

The defendant also offered some evidence to the effect that the plaintiff stated that he thought from the condition of the wind that he would let the fire burn and do away with the rubbish on the side of the track. This statement is denied by plaintiff.

Plaintiff had been shipping wood previous years and some wood remained from the year before. There is no evidence that he did not ship out his wood as fast as he could dispose of it. The greater part of the wood was cut and piled by the track the winter before the fire.

I think it clear that there is an abundance of evidence to support a finding of the jury that there was no contributory negligence either before or after the fire. *Erd v. C. & N. W. R. Co.* 41 Wis. 65.

I think the case was properly disposed of below and that the judgment should be affirmed.

SIEBECKER, J. I concur in the dissenting views of Mr. Justice KERWIN. I am persuaded that the evidence in the case fully sustains the ultimate fact found by the jury and approved by the trial court, that the plaintiff was not guilty of a want of ordinary care which proximately contributed to cause the destruction of his property. Nor can I agree to the proposition, under the circumstances shown, that plaintiff as well as defendant ought reasonably to have anticipated the destruction of plaintiff's property from fire as a natural and probable result of the want of ordinary care in permitting combustible material to accumulate on its track. The plaintiff had the right to presume that defendant would perform its duty in protecting his property against loss by fire. This duty imposes on the defendant an obligation to anticipate the natural and probable results of such negligence which is not imputable to plaintiff, because he had the right to rely on the fact that defendant would comply with the law and protect him.

A motion for a rehearing was denied and the following opinion was filed January 13, 1914:

BARNES, J. An earnest and lawyerlike argument is made by respondent's counsel on a motion for rehearing. A considerable portion of it is devoted to the negligence of the defendants. There is no doubt that the evidence was sufficient to establish the fact that the plaintiff and the defendants were negligent in permitting the right of way to become littered up with highly combustible material, although it was not said in the opinion that plaintiff's negligence in this regard would defeat a recovery.

It is urged that the court in treating the question of contributory negligence started with a wrong premise, and that it reached a wrong conclusion whether the premise was right or wrong.

The court in the former opinion said:

"The jury found that the defendants ought reasonably to have anticipated under all the circumstances that the fire set might probably reach and burn the plaintiff's forest products as a natural and probable result. If the defendants were bound to anticipate the burning of plaintiff's property, then assuredly the plaintiff was bound to anticipate that it would be burned as a natural and probable result of the fire."

The point is made that although the jury found that defendants ought reasonably to have anticipated that the fire set might probably burn the plaintiff's property, it did not and does not follow that plaintiff should reasonably have anticipated such a result. The question submitted to the jury dealt with a fire already set. The plaintiff knew the condition of the right of way for a long time. He knew it was badly littered with combustible material. He had been adding to the amount of it by piling rotten wood and peeling sound wood on it. He knew the condition of his land on either side of the right of way and that it contained a lot of inflammable *débris*. He, with two of his employees, was on the ground when the fire started, and they were there during the usual working hours most of the time until the fire reached the wood, some of them continuously. He knew that the weather had been very dry for a long time. He knew the wind had changed on the morning of May 6th so that it was blowing the fire directly toward the wood, and that it was only 300 or 400 feet therefrom on that morning. He knew that the defendants had not sent any one to put out the fire and had no reason for thinking that any one in authority knew of it, or intended to put it out if they did. The knowledge which the defendants had was imputable to them from the fact that the section crew passed by once or twice a day and a train passed by which did not stop at the siding. Plaintiff knew of every fact about the fire that by any possibility the defendants or their agents or servants could have known or ought to have known. He knew some

things that they did not know. He was a man of intelligence, apparently being an extensive buyer of forest products as well as a farmer. How it can be said on the state of this undisputed testimony that the defendants should reasonably anticipate that the fire which was burning might probably reach and burn the plaintiff's property, while the plaintiff should not reasonably anticipate such a result, passes our comprehension. The rule laid down deals with one element of negligence: reasonable anticipation of natural and probable results from known causes. What causes were known or should have been known by the defendants that were not in fact actually known by the plaintiff, and why was it not as obvious to the plaintiff, who was on the ground, that these causes would produce the results which they did, as it was to the defendants, if not more so? These questions, to our way of thinking, have not been and cannot be answered. The only attempt to answer them is the contention that it was the legal duty of the defendants to keep their right of way clear of rubbish, and, having failed to perform this duty, the appellant had the right to assume that defendants would put out the fire. This argument is no answer to the questions suggested, because it does not touch the question of what should reasonably be anticipated from known causes. Besides, the fire had been burning for two days and the defendants had done nothing in reference to it. They had no men on the ground and there was nothing to indicate that they intended to send any one there.

Under the decisions of this court, cited in the former opinion, it was the duty of the plaintiff, under the circumstances disclosed by the evidence and the finding of the jury referred to, to do what prudence required to preserve his property.

The evidence bearing on contributory negligence was all given by the plaintiff and his employees and is not in dispute. A majority of the court think that it raised no jury

question and that the verdict in this regard does not speak the truth. A minority of the court think otherwise. The evidence has been discussed at considerable length in the opinion of the court and in one of the dissenting opinions. The various facts which we think establish contributory negligence have been referred to in the former opinion. If all still find it difficult to say that the jury was warranted in of the circumstances but one were eliminated, we would exculpating the plaintiff from contributory negligence. We will briefly allude to it.

On the morning of May 6th the plaintiff knew that the wind had changed so as to blow the fire toward his wood; that the wind was brisk; that the fire was within a stone's throw of his wood; that there was an abundance of dry, inflammable material for it to feed on; that there was no one else on the ground, nor likely to be on it, to put the fire out, and that it might probably reach and burn his property within a short time if it was not checked. With this knowledge he did very little to check the spread of the fire and made no call for assistance until it got into his wood shortly after noon. During two or three hours of this critical time he kept his two employees doing their usual work in the wood yard and contenting themselves with looking at the fire occasionally. It may be that this is the kind of care the great mass of mankind would use when they saw a fire approaching which they knew might probably destroy their uninsured property if not checked. It may be that it was the exercise of due prudence for the plaintiff to do as he did. Our reason, experience, and judgment tell us that when property is threatened by fire or flood the generality of mankind do not act in any such way, unless perchance they are fully indemnified against loss by insurance and are indifferent about what becomes of their property. We have no other lamp to guide us in the solution of the question. We have re-examined the evidence, and adhere to the conclusion heretofore reached.

VICKER, by guardian *ad litem,* Appellant, vs. BYRNE and wife, Respondents.

*September 19, 1913—January 13, 1914.*

*Tax titles: Occupancy by original owner: Licensee as agent: Action to bar owner: Defenses: Deposit of taxes, etc.: Extension of time: Terms.*

1. A licensee having no estate or interest in land and yet in lawful occupancy thereof by permission of the owner occupies in the right of the owner as his agent for the purpose of occupation only.
2. Open and obvious occupancy of a tract of land, under an oral license from the owner (the defendant), for the purpose of hauling logs in large quantities across it and banking them upon a creek running through the tract, was "actual occupancy or possession of the defendant, his agent or tenant," within the meaning of sec. 1200, Stats.
3. In an action by the grantee in a tax deed to bar the original owner, although defendant did not at the time of filing his answer make the deposit required by sec. 1200, Stats., the time within which such deposit should be made might, under sec. 2831, Stats., be extended by the court; but such extension should be conditioned upon payment of plaintiff's costs and disbursements up to that time, thus giving plaintiff an opportunity to accept the tender and discontinue his suit.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed in part; reversed in part.*

The appellant, grantee in a tax deed executed May 18, 1909, upon tax certificates issued in 1906 for delinquent taxes of 1905 and conveying the northwest quarter of the northwest quarter and the southeast quarter of the northwest quarter of section 25, township 40 north, of range 2 west, brought this action to bar the original owner, making the wife of the latter a codefendant. Application for the tax deed and an affidavit of nonoccupancy were made on May 18, 1909, as required by sec. 1175, Stats. Respondents answered to the effect that no notice of application for a tax deed was given and that said lands were occupied at the

time the affidavit of nonoccupancy upon which the tax deed issued was filed and had been so occupied during the six months immediately preceding the date of application for said tax deed for a period of more than thirty days by the respondent named, who was then the owner of said land, and that said lands were sold for an unjust and illegal sum in addition to the amount actually levied and assessed against said lands and in excess of the lawful and proper amount due the county at the time of the sale. Respondents did not at the time of filing this answer deposit with the clerk of the court for the use of the appellant the sum for which the lands were sold with interest, etc., as required by sec. 1200, Stats. Testimony was taken before a referee relative to the occupancy of the land in question and to the alleged illegal excess. Upon argument before the court, where it was objected that the deposit was not made, the trial court, upon the application of respondents, made an order extending the time within which such deposit should be made; and the deposit was made.

The trial court found that one McCormick, a logger, occupied said land in his logging operations by oral permission of the respondent; that these operations involved open and obvious possession of the northwest quarter of the northwest quarter from the fall of 1908 to the spring of 1909, and were such that any person going upon said forty-acre tract during that time could readily observe them; that the possession and use of said land so had and made was substantially the only use and possession thereof practicable excepting possession accompanied by cutting the timber. No finding of occupancy was made as to the other forty-acre tract involved, but it was found that this tract was sold for an illegal excess of $1.06 and that the tax deed was invalid as to both tracts. Judgment on the findings was entered dismissing the plaintiff's complaint with costs, taxed at $465.88. No terms were imposed upon the respondents upon granting their ap-

plication at the trial to make the deposit required by sec. 1200, Stats.

Many errors are assigned by appellant, but they may be summed up as follows: (1) There was no sufficient proof of occupancy to entitle the respondents to notice of the application for the tax deed under sec. 1175. (2) Respondents having failed to make the tender and deposit required by sec. 1200, Stats., at the time of pleading, were precluded from attacking the tax deed on account of the illegal excess in the taxes for which the land was sold, and the circuit court had no discretion to extend the time within which to make this tender; or, if it had such discretion, there was an abuse of discretion in not requiring payment of appellant's costs up to the time of such tender.

For the appellant the cause was submitted on the briefs of *Holland & Lovett.*

*William F. Shea,* for the respondents.

The following opinion was filed October 7, 1913:

TIMLIN, J. 1. There is no necessary conflict between secs. 1175 and 1200, Stats. The former forbids the issue of a tax deed except after written notice has been served on the owner or occupant in any case where the land shall have been in the actual occupancy or possession of any person other than the owner and holder of the certificate of such tax sale or some person claiming under him, for the period of thirty days or more, at any time within the six months immediately preceding the time when the tax deed upon such sale shall be applied for. Tax deeds issued contrary to this interdict are of course void. Sec. 1200 relates to defenses against tax deeds which may be made without tender of the taxes due, interest, subsequent taxes, etc. The right to attack a tax deed without such tender for lack of the notice required by sec. 1175 is there limited to cases in which "lands described in the complaint or some part thereof were in the

actual occupancy or possession of the defendant, his agent or tenant, or of some other person through whom he claims title for the period of thirty days or more at some time within six months immediately preceding the expiration of redemption or the six months immediately preceding the time when the deed or deeds mentioned in the complaint were taken."

What is meant by the words "immediately preceding the expiration of redemption" is somewhat uncertain. Sec. 1165. But it is not necessary to construe this clause in the instant case. It appears with sufficient clearness to uphold the finding of the circuit court that the northwest quarter of the northwest quarter was for a period of more than thirty days and within the six months next preceding the application for this tax deed occupied by a licensee of the respondents for the purpose of hauling across and banking on the Butternut creek, which runs through the tract last mentioned, saw logs in large quantities. Some of these were in the creek and some in rollways on the bank. There were three small rollways and seven or eight high rollways and the creek was full of logs. The person engaged in hauling and depositing these logs asked and obtained from the respondent permission so to do. It is argued that because sec. 1200 specifies actual occupancy or possession of the defendant, his agent or tenant, occupancy by a licensee will not suffice. The occupancy by a licensee may and often is of a very temporary character, but it also may be in some cases for rather notorious and continuous purposes, such as maintaining a building or other residence thereon, cutting timber, skidding and hauling it, or, as in the case at bar, using the land as a wharf or landing place for forest products in that navigation which has been recognized and upheld by the laws of this state and consists of driving or floating logs down stream to market or to the place of manufacture. The fundamental distinction between a tenancy and a license of this character is that the license gives no estate or interest

in the land to the licensee and may rest in parol, yet is valid until revoked by the licensor. A license of this kind to occupy real estate borders very closely upon a tenancy at will, but it is not identical. A licensee having no estate or interest in the land and yet in lawful occupancy thereof by permission of the owner, is in substance occupying in the right of the owner as agent of the owner for the purpose of occupation only. This would seem quite clear upon principle. His agency does not extend beyond the mere occupation unless there is something more in the authorization by the owner than mere authority to occupy, as there was in *Rockport v. Rockport G. Co.* 177 Mass. 246, 58 N. E. 1017, 51 L. R. A. 779.

"A license in relation to land is a bare authority to do some act or series of acts upon the land of another without possessing any estate therein." *Hazelton v. Putnam,* 3 Pin. 107. Accordingly we find in *Wing v. Hall,* 47 Vt. 182, 220, where the question arose with reference to interruption of adverse possession by the entry of a licensee of the defendant's grantor, the court said:

"A compliance with the plaintiff's fifth request would have excluded those claiming under the Perkins title from the benefits of the acts done by Richardson, although done under a license from Page, and this would have been error. The acts done by Richardson, if done under a license from Page, are to be considered the same as if they had been done by Page; and such acts would inure to the benefit of the party holding the title under which Page took possession."

Occupation of the visible and noteworthy character here described by the licensee was occupation by the defendant within the meaning of sec. 1200, Stats.

2. But the learned circuit court erred as to the remaining forty-acre tract in allowing the defendant to have the advantage of a tender and deposit, by order extending the time within which to make the same, without imposing costs upon said defendants as a condition of granting such favor. It

is contended by the appellant that the court was without power to extend the time fixed by sec. 1200, *supra*. We cannot agree with this. Power is expressly given by statute to extend the time within which any proceeding in an action may be taken except the time for appealing from a judgment or order. Sec. 2831, Stats. This, however, must be done upon such terms as may be just, and where the extension of time will operate to permit an act or defense not theretofore done or pleaded which will absolutely defeat the plaintiff's action, justice would ordinarily require that the plaintiff's costs and disbursements, so far as this second forty-acre tract is concerned, should be paid up to that time, thus giving the plaintiff an opportunity to accept the tender and discontinue his suit.

*By the Court.*—Judgment is affirmed as to the northwest quarter of the northwest quarter and reversed as to the southeast quarter of the northwest quarter, and as to the latter tract the cause is remanded for further proceedings in accordance with this opinion, the appellant to recover costs in this court.

A motion for a rehearing was denied, with $25 costs, on January 13, 1914.

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OCONTO COUNTY, Appellant, vs. MACALLISTER and others, Respondents. [Three cases.]

*October 8, 1913—January 13, 1914.*

*Official bonds: County treasurer: Sealed instruments: Lack of scroll: Limitation of actions: Statutes: Construction: Definitions: "Knowledge" of default, etc.: What constitutes: Records of county: Examination: Fraud and concealment: Pleading.*

1. An instrument in the form of a bond which was executed by a county treasurer and sureties under a statute in terms requir-

ing a bond, and which expressly states upon its face that it is sealed with the seals of the signers, must be considered a sealed instrument, although there is no scroll or other indication of a seal after the signatures.

2. The time within which an action must be commenced on the bond of a county treasurer was fixed by sec. 4220, R. S. (1878), at twenty years; and by virtue of sec. 4976, R. S. (1878) and Stats. (1898 and 1911), the same limitation continued to be applicable to a cause of action which accrued prior to the enactment of ch. 268, Laws of 1893, unless at the time of such enactment the county had had for three years notice and knowledge that there was a default in the conditions of the bond and that it was entitled to recover thereunder, in which case the time was shortened to ninety days.

3. Ch. 268, Laws of 1893, provided for such actions a limitation of three years after the county had notice and knowledge as stated, but, there being no provision to the contrary, the twenty-year limitation of sec. 4220 continued by virtue of sec. 4976 to be applicable to causes of action accruing after the enactment of said ch. 268 and prior to the revision of 1898, where the county did not have such notice and knowledge.

4. By the revision of 1898, ch. 268, Laws of 1893, became sec. 984 of the Statutes, and was amended by dropping the words "notice and" therefrom, so as to require "knowledge" only, and at the same time sec. 4220 was changed so as to expressly except from it the official bonds mentioned in said sec. 984, thereby leaving the limitation prescribed in that section the only one in force applicable to causes of action thereafter accruing upon such bonds.

5. In the construction of statutes, the subject of the legislation, the context, the associated words, and the mischiefs which the particular statute was intended to guard against, as well as the consequences of a particular interpretation, all factors in arriving at correct results, make mere judicial definitions of particular words used in a different connection and with reference to a different subject of quite subordinate, if of any, importance as aids.

6. Knowledge is more than notice, and may or may not flow from notice; and knowledge of a municipal corporation is quite distinguishable from knowledge on the part of a natural person or a business corporation.

7. A county is not chargeable with "knowledge" (within the meaning of ch. 268, Laws of 1893, or sec. 984, Stats.) of everything that an inspection of the books and records in the treasurer's office would disclose.

8. Especially would it not be chargeable with knowledge of the

contents of duplicate receipts for taxes collected, which were never countersigned as required by law nor filed with the county clerk, as also required, but were retained by the county treasurer in his own files where they had no legal right to be.

9. Knowledge of the failure of the treasurer to have such duplicate receipts countersigned and to file them with the clerk does not necessarily include knowledge that the county "was damaged because thereof," within the meaning of sec. 984, Stats.

10. A county is not chargeable with knowledge of collections made by the treasurer of delinquent taxes before sale, from the mere fact that he indorsed the same upon the delinquent tax return kept in his office, the statute not requiring such indorsement, but a different record in another office and in a different form.

11. If fraud and false entries are resorted to by a county treasurer for the purpose of concealing a default, and he thereby does successfully conceal it from the county officers charged with the duty of investigating, without negligence on their part, the county is not chargeable, as matter of law, with knowledge of the default, even though it might have been discovered by expert examination.

12. But if such officers might from the lawful records, by a cursory investigation, have discovered the default, or if the lawful records on their face plainly show the default, or if actual knowledge is brought home to the officers charged with the duty of examination and accounting, at the time of such examination and accounting—in all cases excluding the delinquent officer,—the county would have knowledge within the meaning of the statute.

13. Lack of knowledge, under the statute, is sufficiently averred in a complaint upon a county treasurer's bond which alleges false entries by the treasurer in his books and false reports of moneys collected by him, made for the purpose of concealing and which did in fact conceal from the plaintiff and its county board the withholding of funds by him, and that neither the county nor its board of supervisors had, prior to a certain date, notice or knowledge of any default in the condition of the treasurer's bond or that the county was entitled to recover thereon.

APPEALS from judgments of the circuit court for Oconto county: S. D. HASTINGS, Judge. *Reversed.*

For the appellant there was a brief by *Adolph P. Lehner,* district attorney, and *John B. Chase,* assistant district at-

torney, and oral argument by *Mr. Chase.* As to the meaning of the word "knowledge" in the statutes in question, they cited *Utley v. Hill,* 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323; *Fidelity & C. Co. v. Gate City Nat. Bank,* 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 82; *McMullen v. Winfield B. & L. Asso.* 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924; *Perry v. Smith,* 31 Kan. 423, 2 Pac. 784; *Moore v. Waco B. Asso.* 19 Tex. Civ. App. 68, 45 S. W. 974; *Lieberman v. First Nat. Bank,* 8 Del. Ch. 519, 45 Atl. 901, 48 L. R. A. 514; *Frederick v. Douglas Co.* 96 Wis. 411, 423, 71 N. W. 798; *McMahon v. McGraw,* 26 Wis. 614; *Fox v. Zimmermann,* 77 Wis. 414, 46 N. W. 533; *Raymond v. Schriever,* 63 Neb. 719, 89 N. W. 308; *Sexton v. Richland Co.* 27 Wis. 349; *Cady v. Bailey,* 95 Wis. 370, 70 N. W. 285; *Boardman v. Flagg,* 70 Mich. 372, 38 N. W. 284; *Mower Co. v. Smith,* 22 Minn. 97. The instrument, though containing no scroll or other device for a seal, is nevertheless an official bond and a sealed instrument. *Platteville v. Hooper,* 63 Wis. 381, 23 N. W. 581; *Kollock v. Parcher,* 52 Wis. 393, 9 N. W. 67; *Oconto Co. v. Hall,* 42 Wis. 59; *Sacramento Co. v. Bird,* 31 Cal. 66; *Saline Co. v. Sappington,* 64 Mo. 72; *People v. Groat,* 22 Hun, 164; *People v. Lowber,* 7 Abb. Pr. 158; *First Nat. Bank v. Briggs' Assignees,* 69 Vt. 12, 37 Atl. 231, 37 L. R. A. 845; *Rutland v. Paige,* 24 Vt. 181; 5 Cyc. 729; *McCarley v. Tippah Co.* 58 Miss. 483, 38 Am. Rep. 338; *State v. Fredericks,* 8 Iowa, 553; *State v. Smith,* 87 Miss. 551, 40 South. 22; *Wilcox v. Perkins Co.* 70 Neb. 139, 97 N. W. 236; *Lehigh Co. v. Gossler,* 24 Pa. Super. Ct. 406.

For the respondents there was a brief by *Greene, Fairchild, North, Parker & McGillan,* and oral argument by *J. R. North* and *J. V. O'Kelliher.* They contended, *inter alia,* that the so-called bond, not being under seal, must be treated as a mere common-law obligation and subject to the six-year limitation of sub. 3, sec. 4222, Stats. The fact that

the instrument recites that the signers have set their hands and seals to it, when in fact it is not sealed, does not make it a sealed instrument as the statutes contemplate. *Davis v. Judd,* 6 Wis. 85; *Taylor v. Glaser,* 2 Serg. & R. 502; *Chilton v. People,* 66 Ill. 501; *Davis v. Bingham,* 39 Misc. 299, 79 N. Y. Supp. 469; 25 Am. & Eng. Ency. of Law (2d ed.) 76; *Boothbay v. Giles,* 68 Me. 160. The county is charged with notice and knowledge of the treasurer's default in the conditions of his bond, and that it is entitled to recover thereunder, in case the books, records, and papers in the county treasurer's or county clerk's offices—which the county board was required to examine in order to properly and truthfully audit the treasurer's accounts and settle with him annually as treasurer—show that he failed to account for the moneys he is charged with having received and converted to his own use. It must be conclusively presumed that the county board had knowledge of the facts which show the default, and that the county was entitled to recover therefor, and a denial of knowledge of the default is ineffectual to contradict such presumed knowledge. *Black v. Black,* 64 Kan. 689, 68 Pac. 662; *Lewis v. Duncan,* 66 Kan. 306, 71 Pac. 577, and cases cited; *Irwin v. Holbrook,* 32 Wash. 349, 73 Pac. 360, 362, 363; *Garfield Co. v. Renshaw,* 23 Okla. 56, 99 Pac. 638; *Lataillade v. Orena,* 91 Cal. 565, 27 Pac. 924, 926, 927; *Wood v. Carpenter,* 101 U. S. 135, 140, 141, 25 L. ed. 807; *Laird v. Kilbourne,* 70 Iowa, 83, 30 N. W. 9; *Dearborn Co. v. Lods,* 9 Ind. App. 364, 36 N. E. 772, 773; *O'Dell v. Burnham,* 61 Wis. 562, 569, 570, 21 N. W. 635; *Ludington v. Patton,* 111 Wis. 208, 242, 86 N. W. 571; *State v. C. & N. W. R. Co.* 132 Wis. 345, 360, 112 N. W. 515; *Shelby Co. v. Bragg,* 135 Mo. 291, 36 S. W. 601; *State ex rel. Bell v. Yates,* 231 Mo. 276, 132 S. W. 672; *Mecosta Co. v. Vincent,* 65 Mich. 503, 507, 33 N. W. 44; 19 Am. & Eng. Ency. of Law (2d ed.) 251.

The following opinion was filed October 28, 1913:

TIMLIN, J. In each of these three actions the appellant county seeks to recover from the county treasurer, *MacAllister,* and the sureties on his official bond. In each the complaint was demurred to, the demurrer sustained, and thereafter judgment entered in favor of the defendants. In each the complaint, except as to dates, omission of scroll hereinafter mentioned, and names of sureties, is identical. One synopsis of the complaints is sufficient to show the questions arising in each.

The complaint averred that *MacAllister* was county treasurer of the appellant, and the other respondents the sureties on his official bond. The town, city, and village treasurers in a given year returned a stated amount of taxes delinquent, and the county treasurer in that year collected a stated amount of such taxes with interest and fees, after the delinquent return and prior to the tax sale, and also collected a stated amount of interest and fees in other cases where the lands were sold at tax sale. Part but not all of the moneys so collected were paid over by the county treasurer. These averments are repeated for each year of each term with a difference only in amounts and dates. The remainder due is stated. It is further averred that while treasurer respondent failed and omitted to make or cause to be countersigned or to file or cause to be filed with the county clerk the duplicate receipts required by sec. 1129, Stats.; that he failed to make entries in his books of account of the sums so received, but did in fact enter in said books for such receipts a less sum than that received; that he entered in said books a false statement of the actual amount of interest and fees and a false statement of the actual amount of the face of the tax going to make up the aggregate of the tax certificates carried in his certificate account, thus making it

appear that the aggregate sum evidenced by certificates of sale contained a greater amount than it actually contained and therefore a less amount of interest and fees than he actually received. In each year the treasurer made and filed an annual report containing false statements of the amount of these delinquent taxes, interest, and fees collected by him. All of these omissions and false entries were for the purpose of concealing from the plaintiff and its county board the fact of the treasurer withholding said funds, and the false entries and omissions did conceal this fact. That neither the plaintiff county nor its board of supervisors or any member of the latter had prior to August 29, 1910, notice or knowledge that there was any default in the condition of the treasurer's bond or that the county was entitled to recover thereon, and the appellant and its county board of supervisors had no knowledge or information that the treasurer had failed to account as required by law or that he had unlawfully converted said sums of money or any part thereof. Demand upon respondent *MacAllister* was made before the commencement of this action and on November 19, 1910, but he neglected and refused, etc. Judgment for a stated sum is asked.

By stipulation of counsel we are also to treat the complaint as if it contained an allegation to the effect that the treasurer, in receiving before sale a payment of taxes returned delinquent, entered the fact and date of such payment on the proper delinquent return opposite the tax so returned delinquent and the description of land on which such taxes were assessed or the name of the person paying delinquent personal property taxes, together with a reference by number to the duplicate receipt for such payment, also numbered and kept on file in the said county treasurer's office—which duplicate receipt showed in each case the tax collector's fees, interest charged, and advertising fee if any included in such payment. The complaint avers that *MacAllister* entirely

omitted and failed to make or cause to be countersigned by the county clerk or to file in the office of the county clerk any duplicates of the receipts made and delivered to the taxpayers. This stipulation seems to modify the averments of the complaint to the extent that *MacAllister* did keep a duplicate receipt not countersigned by the county clerk nor filed in the office of the latter, but on file in the county treasurer's office, and that this duplicate receipt showed in each case the tax collector's fees, interest, and advertising fee, and it further seems to add to the complaint what is equivalent to an averment that *MacAllister* did enter on the delinquent tax roll opposite the property taxed, or in case of personal property opposite the name of the person taxed, the fact, date, and amount of payment.

For convenience of reference these cases will be numbered 1, 2, and 3. No. 1 covers the county treasurer's term ending on the first Monday of January, 1891; No. 2 covers the county treasurer's term ending on the first Monday of January, 1897; and No. 3 such term ending on the first Monday in January, 1899.

When the cause of action accrued in No. 1 on the first Monday of January, 1891, the period of limitation was by sec. 4220, R. S. 1878, twenty years. Ch. 268, Laws of 1893, introduced a new limitation applicable to a particular condition after the cause of action had accrued in No. 1. It contained no repealing clause nor anything inconsistent with the continuation in force of sec. 4220, except as to the special case covered by the ninety-day clause hereinafter referred to. By sec. 4976, R. S. 1878, Stats. 1898, and Stats. 1911, this statute of limitation in force when the cause of action accrued must be held "operative to determine all such limitations and periods of time which shall have previously begun to run." It does not appear upon the face of the complaint that this action was commenced after the first Monday of January, 1911, hence if the case is covered by

the twenty-years limitation in force when the cause of action accrued at the close of the county treasurer's term, the right of action is not barred unless barred by said ninety-day clause. From the enactment of ch. 268, Laws of 1893, to the revision of 1898 there was no change in the statutes of limitation in question. During the period last mentioned, but only as to causes of action accruing during that period, there were (omitting the ninety-day provision) two statutes of limitation in force affecting actions on official bonds under seal, viz.: sec. 4220, which provided a period of twenty years from the time the cause of action accrued, and ch. 268, Laws of 1893, which provided a period of three years after the municipality had received both notice and knowledge of the fact that there was a default in the conditions of the bond and that it was entitled by law to recover. In cases in which the municipality had had at the time of the passage and publication of this act of 1893 such notice and knowledge for three years, there were ninety days allowed within which to bring an action. Such notice and knowledge would, as to causes of action accruing during the period between 1893 and 1898, shorten the limitation of twenty years to three years in case of notice and knowledge, and in the particular case mentioned to ninety days. The revision of 1898 brought about a change in ch. 268, Laws of 1893, which became sec. 984 of that revision, by dropping out the words "notice and" and by omitting the provision relating to suits within ninety days, and otherwise, so that the statute thereafter and now reads: "within three years from the time such county . . . received knowledge of the fact that there was a default in some of the conditions of such bond and that it was damaged because thereof." In the same revision sec. 4220 was changed so as to expressly except from it those sealed instruments mentioned in said sec. 984 of the same revision. During all this time sec. 4976, Stats., was and it still is in force and effect. By force of the last men-

tioned section the statute of limitations which had begun to run on the cause of action pleaded in No. 1 continued to run and to govern the time within which such action must be brought, because no statute otherwise expressly provided except in those special cases in which the municipality had had for three years both notice and knowledge of the fact that there was a default in the conditions of the bond and that it was entitled by law to recover thereunder. It is significant that in order to have this effect there must be both notice and knowledge not only of the facts but also of the legal rights of the municipality. If it does not appear upon the face of the complaint that the municipality had such notice and knowledge for three years prior to the enactment of said ch. 268, the limitation provided by sec. 4220, *supra*, was continued in force by sec. 4976, and the judgment in No. 1 must be reversed.

No. 2.

In No. 2 the cause of action accrued prior to the revision of 1898 but after the enactment of said ch. 268. It therefore falls within the purview of sec. 4976, Stats., and is affected by two limitations, viz.: three years if there was notice and knowledge, twenty years if there was not. Hence the judgment in No. 2 must also be reversed unless the county had notice and knowledge as stated in the statute, or unless the case can be distinguished and brought under the six-years statute of limitations by reason of the fact that no scroll or other representation of a seal appears opposite the names of the signers or in any place upon said instrument. The statute, however, required a bond. The instrument is in the form of a bond, contains a penal clause with a defeasance, and also the following: "Sealed with our seals and dated this 27th day of November, A. D. 1894." Under such circumstances this must be considered a sealed instrument. The mere omission of a scroll or flourish after the

names of the signers would be quite a flimsy ground of distinction and cannot outweigh the consideration that the statute required a bond which imports a sealed instrument, that the instrument is in the form of a bond, and that it is expressly stated to be sealed with the seals of the signers.

Nos. 1, 2, and 3.

The cause of action in No. 3 accrued after the revision of 1898 went into effect and after causes of action on the official bonds mentioned in sec. 984, Stats. 1898, were expressly excepted from the provisions of sec. 4220, Id., therefore is governed solely by sec. 984, Id. But this statute as it appeared in said ch. 268 also affected No. 1 if at the time of its enactment the county had had for three years such notice and knowledge, and No. 2 if after the passage of the said act of 1893 and before the commencement of this action the county had for three years or more such notice and knowledge.

Appellant's counsel have cited us to judicial definitions of the word "knowledge" as distinguished from notice in a contract of suretyship. *First Nat. Bank v. U. S. F. & G. Co.* 150 Wis. 601, 609, 137 N. W. 742. In a statute relating to supplemental pleadings. *Peoples v. Carrol,* 11 Heisk. (58 Tenn.) 417. In a contract of suretyship. *Fidelity & C. Co. v. Gate City Nat. Bank,* 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821. Under a statute making criminal all receipt of deposits with knowledge that the bank is unsafe or insolvent. *Utley v. Hill,* 155 Mo. 232, 55 S. W. 1091. In a statute relating to duties of prosecuting attorney. *State v. Ransberger,* 106 Mo. 135, 17 S. W. 290. Distinction between knowledge and actual knowledge. *Kirkham v. Moore,* 30 Ind. App. 549, 65 N. E. 1042. Between knowledge and belief. *Ohio Valley C. Co. v. Goble,* 28 Ind. App. 362, 62 N. E. 1025. Between the words "knowledge" and "notice." *Clarke v. Ingram,* 107 Ga. 565, 33 S. E. 802;

*Levins v. W. O. Peeples G. Co.* (Tenn. Ch. App.) 38 S. W. 733.

These cases are of little aid in construction. We may look at ch. 268, *supra,* to aid us in determining the proper construction of sec. 984, *supra,* for it may be presumed that no very radical change was intended by the revision. Knowledge of a fact or condition and "knowledge of the fact that there was a default in some of the conditions of such bond and that it was damaged because thereof" can easily be differentiated. Knowledge of a sentient person is quite different from knowledge of a municipal corporation. The subject of the legislation, the context, the associated words, and the mischiefs which the particular statute was intended to guard against, as well as the consequences of a particular interpretation, all factors in arriving at correct results, make mere judicial definitions of particular words used in a different connection and with reference to a different subject quite subordinate aids, if any aid, in interpretation.

The respondents cite *Black v. Black,* 64 Kan. 689, 68 Pac. 662, 667; *Lewis v. Duncan,* 66 Kan. 306, 71 Pac. 577; *Irwin v. Holbrook,* 32 Wash. 349, 73 Pac. 360; *Board of Comm'rs v. Renshaw,* 23 Okla. 56, 99 Pac. 638; *Lataillade v. Orena,* 91 Cal. 565, 27 Pac. 924; *Wood v. Carpenter,* 101 U. S. 135; *Laird v. Kilbourne,* 70 Iowa, 83, 30 N. W. 9; *Shelby Co. v. Bragg,* 135 Mo. 291, 36 S. W. 600; *State v. Yates,* 231 Mo. 276, 132 S. W. 672; *Mecosta Co. v. Vincent,* 65 Mich. 503, 33 N. W. 44. These cases relate to the discovery of fraud under statutes of limitation which provide that the statute shall begin to run at the time of the discovery of the fraud, or which relate to the concealment of the cause of action and provide that the statute shall begin to run from the time of its discovery or the discovery of the facts constituting the fraud or the concealment. They throw little light upon the question of construction here involved,

on account of the difference in expression and difference in the subject legislated upon. They are somewhat analogous, but the analogy is far from perfect. Generally speaking, they are in line with *O'Dell v. Burnham,* 61 Wis. 562, 21 N. W. 635, where, however, it was said, quoting *McMahon v. McGraw,* 26 Wis. 614, 622: "The discovery by the aggrieved party of the facts constituting the fraud is an actual discovery, and not a mere constructive discovery." In *Ludington v. Patton,* 111 Wis. 208 (86 N. W. 571), it was said at page 242: "It must be conceded that the statute of limitations commenced to run against the appellant from the time she obtained knowledge of the fraud or might have obtained such knowledge by the exercise of reasonable diligence."

In *State v. C. & N. W. R. Co.* 132 Wis. 345 (112 N. W. 515), at page 360, this question is considered with reference to an alleged concealment of a cause of action where no statute provided that such concealment should extend the period of limitation. This is a situation quite different from that in the case at bar. There was there no such statute, no false entries, no contrivance upon the part of the defendant to mislead the plaintiff, and nothing to show but that the plaintiff had full opportunity to make an investigation of the business so as to ascertain whether the reports of the defendant were correct. It has very little bearing upon the question of construction of a statute like that before us.

What follows is relevant to all the cases Nos. 1, 2, and 3. The learned circuit judge stated the question to be, "whether the county is chargeable with knowledge of all that the records showed relative to errors in the treasurer's account submitted for audit by the county board at the close of his term, although they did not, as a matter of fact, make such examination of books and vouchers in their possession as to discover existing errors, it not being claimed that actual knowl-

edge of a defalcation existed until discovery." He then proceeded as follows:

"So far as the question is concerned, I do not think that it makes any difference how easy or difficult it may be to ascertain the facts from the books or documents which it is the duty of the board to examine in auditing the treasurer's account. . . . If the county officers, and through them the county, are chargeable with knowledge of anything that an inspection of the books and records would disclose, they are chargeable with everything that such inspection would disclose."

We cannot approve of this view of the statute. According to this it would require less to charge one with knowledge than it does to charge one with notice, for the officers would under common law be only chargeable with notice of what an ordinarily diligent investigation would disclose. Knowledge is more than notice. It may or may not flow from notice, depending sometimes upon the kind of notice, whether actual or constructive, the extent of notice, the relationship of the parties, and the degree of knowledge required by the statute. This construction would in practical effect make the statute operate as a simple three-years limitation, because in all cases such knowledge could be acquired by an expert accountant except where the records and memoranda were out of existence. We are not certain in this connection what the learned circuit court meant by "books and documents." If he referred to the duplicate receipts, not countersigned as required by law and not filed with the county clerk as required by law but left in the office of the county treasurer, these were not official documents or records and there was no duty to look for them among the files of the county treasurer's office, where they had no legal right to be. If he referred to the return of delinquent taxes required by sec. 1113, Stats., that was a record required by law to be kept, and if duly verified (sec. 1114) was evidence of the amount of taxes re-

turned delinquent, but we have been referred to no statute and have found none making it the duty of the county treasurer to indorse payments of delinquent taxes upon this delinquent return. On the contrary, the statute makes it the duty of the county treasurer, at the time the return of delinquent taxes is made to him, to deliver to the officer making such return a certificate of the amount of delinquent taxes so returned, which shall be delivered to the county clerk, who shall file the same in his office. The county treasurer is forbidden to satisfy the bond of the town, village, or city treasurer until this certificate is delivered to the county clerk and filed in the office of the latter. The county treasurer, therefore, must see that this is done. The purpose of filing this certificate with the county clerk is to have a check upon the county treasurer and so as to charge the latter with the whole amount of taxes returned delinquent, and it forms the proper record to be referred to in settlement with the county treasurer. When any tax on lands returned delinquent is paid to the county treasurer before sale, with interest and charges, the treasurer is required to execute duplicate receipts therefor, each countersigned by the county clerk, showing the name of the person paying the same, the date, amount, and description of land, etc., and one of these shall be delivered to the taxpayer and the other filed by the county clerk. Sec. 1129. We may presume that the county board had knowledge of the failure to have countersigned and to file these duplicate receipts with the county clerk, but the statute requires more than this. There must also have been knowledge that the county was damaged by such failure. This is also a check upon the county treasurer, and these two are the legal vouchers or records for settlement with the county treasurer, and not the entries or memorandum of the county treasurer on the delinquent tax return kept in his office. The law does not require such entries, but a different record in another office and in a different form. See, also,

sec. 1141. These requirements tend to show that the county clerk's office must contain all data necessary for a settlement and accounting with the county treasurer. What would be the result had the county board or its committee actually seen the delinquent tax return with this memorandum indorsed thereon we need not speculate. It is sufficient that they were not required to look in such a place for data which the law provided should be kept elsewhere and in a different and more authentic form, verified by a different officer. These being the two facts added by stipulation, we think they did not overcome the positive averments of lack of knowledge found in the complaint, coupled with the charges of false entries, deception, and fraud practiced by the county treasurer. Of course this must be understood to mean, not that we find that false entries were made or that fraud existed. Indeed, there is some perceptible suggestion to the contrary, but it means that these matters are sufficiently alleged.

Under our liberal rules of pleading, lack of knowledge is sufficiently averred in the complaint, and hence it is admitted by demurrer except as to these two matters above mentioned. By these the averment of lack of knowledge is not avoided. Under such a complaint the plaintiff may prove a condition of absence of official or proper entries and presence of false and misleading entries sufficient to establish lack of knowledge on its part, and so surcharge and falsify any account heretofore stated between the county and its treasurer. This applies to amounts alleged to have been collected at the sale as well as to those collected before sale. In the interpretation of said ch. 268 and said sec. 984, we must bear in mind that they deal only with causes of action accruing to municipal corporations and only with notice to and with the knowledge of municipal corporations, and relate to actions against fiduciaries.

The knowledge of a municipal corporation is quite distinguishable from knowledge on the part of a natural person

or a business corporation. In the case of a natural person this is obvious. In the case of a business corporation the officers are the agents of the corporation, not only within their statutory and common-law duties, but as to all duties that may be imposed upon them by express command of the governing body of the corporation or by the usual course of business of the corporation. In a municipal corporation this is not true. The relation of the officer to such corporation is that created by statute only. Knowledge of a municipal corporation cannot be taken to mean knowledge of its inhabitants or constituent members. The entity itself cannot have knowledge in the same sense that a natural person may possess it. It can have knowledge only from its records authorized by law and through its officers upon whom the duty is cast by statute to know the contents of these records. A successful deception of these officers without negligence on their part would not constitute knowledge of the municipality. Neither is a municipal corporation chargeable with knowledge under the statute in question merely because the fact of default on the bond might have been discovered by expert examination. If such default would not have been discovered by an ordinarily careful examination such as would have been made and is usually made by laymen inexperienced in accounting who ordinarily constitute the county board, then the county cannot be as matter of law charged with knowledge of the default. If fraud and false entries are resorted to by the official for the purpose of concealing the default and this did successfully conceal the default from men of the description stated making such an examination, the county cannot be chargeable with knowledge. But if the officers charged with the duty of investigating might from the lawful records, by a cursory investigation, have discovered the default, or if the lawful records on their face plainly show the default, or if actual knowledge is brought home to

the officers of the municipality charged with the duty of examination and accounting, at the time of such examination and accounting, in all cases excluding the delinquent officer, the county would have knowledge. It seems to us that under the averments of the complaint in this action this matter of knowledge as required by the statute is a question of fact to be litigated at the trial, and that possession of such knowledge by the county does not appear upon the face of the complaint either alone or aided by the stipulation referred to.

It follows that the judgments in Nos. 1, 2, and 3 must be reversed, and the causes remanded for further proceedings according to law.

*By the Court.*—It is so ordered.

A motion for a rehearing was denied, with $25 costs, on January 13, 1914.

OCONTO COUNTY, Appellant, vs. LINDGREN and another, Respondents.

*October 8—October 28, 1913.*

*Oconto Co. v. MacAllister, ante,* p. 286, followed.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, Judge. *Reversed.*

For the appellant there was a brief by *Adolph P. Lehner,* district attorney, and *John B. Chase,* assistant district attorney, and oral argument by *Mr. Chase.*

For the respondents there was a brief by *Classon & O'Kelliher,* and oral argument by *D. G. Classon* and *J. V. O'Kelliher.*

The following opinion was filed October 28, 1913:

TIMLIN, J. This case is in all respects similar to the cases of *Oconto Co. v. MacAllister, ante,* p. 286, 143 N. W. 702, except that the term of the county treasurer, *Lindgren,* expired on the first Monday of January, 1905, and except as to amounts. A demurrer to the complaint was sustained, and after the time for amending had expired judgment was entered thereon dismissing the complaint, and from this judgment the appeal is taken.

The case is ruled by *Oconto Co. v. MacAllister, ante*, p. 286, 143 N. W. 702, and the judgment must be reversed and the cause remanded for further proceedings according to law.

*By the Court.*—It is so ordered.

A motion for a rehearing was made in this case, but was afterwards abandoned.

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STATKAWICZ, Respondent, vs. LAGUNA, Appellant.

*October 9, 1913—January 13, 1914.*

*Appeal: Bill of exceptions: Affirmance.*

In the absence of a bill of exceptions embodying specific exceptions to the findings of fact, this court cannot determine that the findings are unwarranted by the evidence or that a new trial should have been granted because of newly discovered evidence; hence a judgment supported by the pleadings and findings must be affirmed.

APPEAL from a judgment of the municipal court of Racine county: WM. SMIEDING, JR., Judge. *Affirmed.*

Action to recover on a money demand. The trial of the cause resulted in findings in favor of plaintiff. A motion was made on newly discovered evidence for a new trial which was denied. Judgment was rendered in plaintiff's favor for $412.22 damages and costs, in accordance with the findings. An exception to the judgment, signed by the judge and denominated a bill of exceptions, was filed and a separate such paper was filed as to the order denying the motion for a new trial. There were no specific exceptions filed to the findings of fact. There was no bill of exceptions settled.

For the appellant the cause was submitted on the brief of *Tullar & Lockney, Stahl & LeWald,* and *Samuel G. Hamblen.*

For the respondent there was a brief by *Simmons & Walker,* and oral argument by *J. B. Simmons.*

The following opinion was filed October 28, 1913:

MARSHALL, J. It is not contended but what the pleadings and findings support the judgment. Without a bill of exceptions properly settled, we are unable to officially know whether the findings are unwarranted by the evidence or whether there was newly discovered evidence, which, in view of the other evidence, entitled appellant to a retrial. Therefore, the judgment must be affirmed.

*By the Court.*—So ordered.

The appellant moved for a rehearing. The following opinion was filed January 13, 1914:

MARSHALL, J. A strong appeal is made to the court to ignore what counsel is pleased to call immaterial errors, and decide the case upon the merits instead of adhering to the first disposition, made upon the ground of the record not being sufficient to warrant a review of the findings as to whether they are supported by the evidence. In view of recent history, that the purpose here is, so far as practicable, to decide every case upon the merits, ignoring all unsubstantials, needs no declaration or new illustration. In this case, the court went to the very limit of ignoring errors in entertaining the appeal at all. There were pretty good grounds for dismissing it. Probably by former practice that course would have been taken. There is no need to refer to the imperfections in the appeal in detail. When it comes to reviewing findings of fact without their being excepted to and the exceptions incorporated in the bill of exceptions, both the written and the unwritten law bar the way. I might add: it may be it were better if that were not so; that in case of a party feeling himself aggrieved because of findings of fact being contrary to the evidence he were free to raise the question on appeal without the formality of exceptions duly filed and made a part of the bill of exceptions,

or even without there being any bill of exceptions at all, so long as all the evidence upon the trial be present, certified by the official reporter; but the law as it now stands would need to be radically changed to authorize the court to approach very near to that. A mere bill of exceptions is not sufficient to warrant a review as to whether material findings are wrong. There must be a bill embodying specific exceptions to the findings of fact. The decisions of this court are so numerous in respect to the matter that it does not seem necessary to even refer to them.

The suggestion in the short opinion previously filed as to there being no bill of exceptions is not strictly accurate. The statement should have been to the effect that there was no sufficient bill of exceptions, in that there was none embodying specific exceptions to the findings of fact. However, it may be safely said that had there been such exceptions the result would probably have been the same. So appellant has not really been prejudiced, either by failure to file such exceptions and embody the same in a bill of exceptions or by the numerous imperfections in the appeal itself.

*By the Court.*—The motion is denied.

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WALLIS, Appellant, vs. FIRST NATIONAL BANK OF RACINE and others, Respondents.

SAME, Respondent, vs. SAME, Appellants.

*October 10, 1913—January 13, 1914.*

*Contracts: Construction: Intent of parties: Conveyances of land: Rights reserved and acquired: Easements: Common stairway: Rebuilding: Alterations: Party walls: Rights of owners: Repairs: Increasing height.*

1. To aid in determining the intention of the parties to a contract, when that is doubtful, the contract may be read in the light

of the circumstances which surrounded the parties when it was made.

2. Express enumeration, in contracts embracing mutual conveyances of land or interests therein, of the rights reserved and acquired by the parties raises a fair implication that such enumeration covers all rights intended to be reserved or acquired.

3. Under certain agreements embracing mutual conveyances between defendant's grantor and plaintiff's grantors, who then owned adjoining parcels of land, one of such agreements having been made at the time, and the other twenty-three years after, defendant's grantor built a party wall upon, and inclosed in her two-story building, a narrow strip of the parcel belonging to plaintiff's grantors, it is *held* that the only rights which plaintiff's grantors retained (and which he acquired) in that part of said strip not covered by the party wall were an easement to use the stairway in said building, adjoining the party wall, for all purposes of access to and egress from any building which might thereafter be erected on their land, the right to pierce the party wall for that purpose, and the right to have the stairway maintained at all times in good condition and repair.

4. No new building having been erected on plaintiff's parcel to which such right of access and egress would apply, defendant had the right, in reconstructing its building, to remove the old stairway and replace it with a new and better one, and also to make it one foot lower, it not appearing that such changes would in any way injure plaintiff.

5. Defendant had the right, also, to remove and replace with better material the facing of the front end of the party wall, if such change would not injure plaintiff, and the right to repair or replace the adjoining front wall of its building, so long as plaintiff was not thereby deprived of the use of the stairway.

6. Defendant might also increase the height of the party wall twenty-eight inches, the wall being of sufficient strength.

7. It is *not held* that if defendant should add more stories to its building plaintiff would not have the right to have stairways built over the present one to reach such upper stories, and the right to pierce the party wall to reach such stairways.

8. The owner of property subject to an easement has the right to make incidental changes in the real estate over which the easement extends, or to make beneficial use of the same, provided there is no substantial impairment of the right granted.

9. The owner of an undivided half of a party wall and of the land on which it stands has a right to repair the wall when neces-

**sary and a right to raise the height of the wall, it being of sufficient strength, without the consent and even against the protest of the other owner, if those things can be done without injury to the latter.**

APPEALS from a judgment of the municipal court of Racine county: WM. SMIEDING, JR., Judge. *Affirmed on plaintiff's appeal; reversed on that of defendants.*

In 1885 one Catherine Schulver owned the north forty feet of lot 5 of block 26 of the city of Racine, and her two children, Albert and Annie Huse, owned the south twenty feet of said lot. Mrs. Schulver was either building or contemplating the erection of a building on the portion of the lot owned by her. The Huses and Mrs. Schulver entered into a contract by the terms of which the Huses conveyed to Mrs. Schulver an undivided one-half interest in a strip of land located in the northeast corner of the portion of lot 5 owned by them, two and one-half feet in width from north to south and twenty-nine and one-half feet in length from east to west, and adjacent to the portion of lot 5 owned by Mrs. Schulver. This strip will hereafter be referred to as the two and one-half foot strip. In consideration for such conveyance, Mrs. Schulver conveyed to the Huses an undivided one-half interest in and to a certain wall then being built by her, as well as a like interest in the land on which the wall stood. The wall was described as the south wall of a building then being built by Mrs. Schulver on the lot aforesaid and adjoining lands owned by the Huses, and the contract recited that it was the intention of the parties that such wall should be a party wall. It was further agreed that the contract carried with it the right on the part of the Huses to pierce said wall at such place or places as might be necessary for the purpose of providing "means of exit or egress out of or to any building" which the Huses might thereafter erect or cause to be erected on their portion of said lot 5.

Mrs. Schulver erected what is described as a two-story

green stone front building on her parcel in 1885, such building also covering the two and one-half foot strip in which the Huses conveyed her a half interest. At the time such building was erected there was a small building on the Huses' portion of lot 5, which still remained there when this action was brought. No new building has been built thereon and there has been no occasion for the Huses or their grantees to pierce the wall erected by Mrs. Schulver.

In 1908 the Huses and Mrs. Schulver, conceiving that the agreement of 1885 did not clearly express the intention in the minds of the parties when it was made, entered into a second agreement defining the rights and interests of the parties. This agreement recited that Mrs. Schulver did not intend to convey an undivided one-half interest in the land on which the wall on the south side of her lot was erected, but only a half interest in the wall itself, and the owners of the Huse interest reconveyed to Mrs. Schulver the interest in the fee of the land on which the wall on her south boundary line stood. This portion of the contract probably was not intended to apply to so much of the wall as stood on the south and west sides of the two and one-half foot strip. Mrs. Schulver on her part granted and conveyed to the owners of the Huse interests in lot 5, their heirs and assigns, "the right, privilege, and easement to use the stairway constructed by said party of the first part [Mrs. Schulver], and now existing, in her two-story brick and stone building heretofore erected by her," and now standing on the two and one-half foot strip and the part of lot 5 owned by Mrs. Schulver. The stairway is described as being of the width of fifty-four inches between walls. The right of occupancy of the stairway is granted for all purposes of access to and egress from any building which may be hereafter erected on the adjoining parcel of land, together with the right to pierce the wall erected on the south line of said strip at such place or places as may be necessary for the purpose of pro-

viding access to or egress from such new building. Mrs. Schulver further covenanted to maintain the stairway at all times in good condition and repair at her own expense, and it was agreed that such undertaking should constitute a covenant running with the land. The contract then recited:

"And said parties of the second part [the owners of the Huse interest], in consideration of the premises and for value received, do hereby grant, bargain, sell and convey unto the said party of the first part all their right, title and interest in and to the fee of the land adjoining the south boundary line of the parcel first herein described, upon which stands the brick wall of the said building of the party of the first part, reserving only the undivided interest conveyed by said deed of August 13, 1885, in the wall itself and the right and privilege to use the same for all purposes of a party wall, in connection with the parcel last above described, adjoining said building on the south."

It is contended, and perhaps correctly, that the paragraph above quoted has no reference to the two and one-half foot strip, but only to the wall along the boundary line between the two parcels of land to the west of such strip.

At the time this action was commenced, the defendant the *First National Bank of Racine* had become the owner of the rights and interest of Mrs. Schulver in lot 5, and the plaintiff, *Wallis,* had become the owner of the Huse interests in said lot. Before action was begun the bank had let a contract for the erection of a new building on the property acquired from Mrs. Schulver. The plans did not contemplate the destruction of the south wall except the tearing down of the facing on the front thereof and its replacement with granite so as to make it harmonize with the remaining portion of the front of the new building. The plans did contemplate the raising of the party wall about twenty-eight inches and the tearing out of the old stairway and its replacement by another of the same width built of concrete and marble. The height of the floor of the second story of

the new building was to be one foot less than the height of the second floor of the old one, so that the proposed new stairway would be one foot lower than the old one, although it would have the same number of steps. The landing of the new stairway would extend substantially as close to the rear of the twenty-nine and one-half foot strip as did the old stairway. The bank proposed to use a part of the space over the front part of the stairway for a part of an office room on the second floor. Such use had been made of such space in the original building since its erection in 1885.

The plaintiff brought this action to restrain the defendant bank from (1) raising or interfering with the party wall; (2) tearing out the face of such wall; (3) interfering in any manner with the stairway in the original structure; (4) appropriating any portion of the two and one-half foot strip to its use, to the exclusion of the plaintiff. A temporary injunction was granted restraining the doing of the acts and things complained of. On motion of the defendant bank, *Louis* and *Robert Nelson,* the parties who had the contract for the construction of the building, were brought in as parties defendant. There is practically no dispute about the facts.

As conclusions of law, among other things, the trial court found: (1) That the defendant had no right to raise the party wall; (2) that the defendant had no right to inclose the two and one-half foot strip in the added height to which it proposed to construct the new building, the south wall of which was intended to be twenty-eight inches higher than the south wall of the old building; (3) that defendant did have the right to replace the stairway with a new one of the same dimensions and height and in the same location and having its landing in the same place as the old stairway, provided the new stairway was equal to or greater than the old stairway in strength and durability; (4) that the wall on the south side of the two and one-half foot strip was a

party wall; and (5) that the parties were tenants in common in the two and one-half foot strip.

The effect of the findings and judgment was to adjudicate that the defendant had the right to remove the facing of the old wall in front of the two and one-half foot strip and replace the same with other material at least equally as good, and that Mrs. Schulver had the right to use so much of the two and one-half foot strip that was inclosed as was not subject to use for stairway purposes.

Judgment was entered in accordance with the conclusions of law, and the defendants appeal therefrom. The plaintiff appeals from so much of said judgment as adjudges that the injunction "should not be construed or extended as to preclude defendants from replacing the present stairs and stairway with a new stairway of such materials as defendants may select of equal or greater strength and durability; said stairway to be of the same dimensions and size and in the same location and position and at the same height, and that, excepting as herein modified, the preliminary injunction secured by the plaintiff in this action be dissolved."

For the plaintiff there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles,* of counsel, and oral argument by *W. C. Quarles.* They contended, *inter alia,* that the plaintiff was the owner in fee of an undivided one-half of the two and one-half foot strip, and defendants could make no changes in that portion of the building without his consent, even though it inflicted little or no damage upon him. *Allegheny Nat. Bank v. Reighard,* 204 Pa. St. 391, 54 Atl. 268; *Haslett v. Shepherd,* 85 Mich. 165, 48 N. W. 533; *Robbins v. Archer,* 147 Iowa, 743, 126 N. W. 936; *Alexander Smith & Sons C. Co. v. Ball,* 143 App. Div. 83, 127 N. Y. Supp. 974; *Kavanaugh v. St. Louis T. Co.* 127 Mo. App. 265, 105 S. W. 278; *Killion v. Kelley,* 120 Mass. 47; *Miller v. Hoeschler,* 126 Wis. 263, 105 N. W. 790.

For the defendants there were briefs by *Hand, Hand &*

*Quinn,* attorneys, and *William D. Thompson,* of counsel, and oral argument by *E. B. Hand* and *T. M. Kearney.* They argued that the rights reserved to plaintiff's grantors excluded all others by necessary implication; that the acts of the parties extending over a long period were of controlling weight in determining their rights; that a release of title or rights in real property may be implied by authority to another to do something on the land inconsistent therewith; and that the right once granted cannot be revoked so as to stop changes or improvements begun under the authority given. *Kirch v. Davies,* 55 Wis. 287, 11 N. W. 689; *Smith v. Ford,* 48 Wis. 115, 2 N. W. 134, 4 N. W. 462; *Murray Hill L. Co. v. Milwaukee L., H. & T. Co.* 110 Wis. 555, 86 N. W. 199; *Jones v. Thomas,* 120 Wis. 274, 97 N. W. 950; *Valley P. & P. Co. v. West,* 58 Wis. 599, 17 N. W. 554; *Davies v. Skinner,* 58 Wis. 638, 17 N. W. 427; *Kutz v. McCune,* 22 Wis. 628; *Dyer v. Sanford,* 9 Met. (Mass.) 395; *Elliott v. Rhett,* 5 Rich. Law (S. C.) 405; *Winter v. Brockwell,* 8 East, 308; *Liggins v. Inge,* 7 Bing. 682; *Hazelton v. Putnam,* 3 Pin. 107; *Pope v. O'Hara,* 48 N. Y. 446; *Veghte v. Raritan W. P. Co.* 19 N. J. Eq. 142; *Foot v. New Haven & N. Co.* 23 Conn. 214; *Morse v. Copeland,* 2 Gray, 302; *Addison v. Hack,* 2 Gill, 221; *Duncan v. Rodecker,* 90 Wis. 1, 62 N. W. 533. They also contended that even if plaintiff was a part owner of the two and one-half foot strip, the wall thereon was a party wall and defendant had all the rights in respect thereto and in the intervening strip which pertain to party walls, including the right to make changes, repairs, and extensions not injurious to the other party. To these propositions many authorities were cited. To the point that plaintiff's easement in the stairway did not preclude defendant from making changes and improvements in its property which did not impair the enjoyment of such easement, they cited, among other cases, *Atkins v. Bordman,* 2 Met. (Mass.) 457;

*Perry v. Snow,* 165 Mass. 23, 42 N. E. 117; *Chandler v. Goodridge,* 23 Me. 78; *Pomeroy v. Salt Co.* 37 Ohio St. 520; *Duross v. Singer,* 224 Pa. St. 573, 73 Atl. 951; *Bakeman v. Talbot,* 31 N. Y. 366; *Grafton v. Moir,* 130 N. Y. 465, 29 N. E. 974; *Low v. Streeter,* 66 N. H. 36, 20 Atl. 247, 9 L. R. A. 271; *Van O'Linda v. Lothrop,* 21 Pick. 292; Washb. Easem. & Serv. (4th ed.) 294; *Chapin v. Brown,* 15 R. I. 579, 10 Atl. 639; *Ruge v. Apalachicola O., C. & F. Co.* 25 Fla. 656, 6 South. 489; *Andrae v. Hazeltine,* 58 Wis. 395, 17 N. W. 18; *Putzel v. Drovers' & M. Nat. Bank,* 78 Md. 349, 28 Atl. 276, 22 L. R. A. 632; *Standard Bank v. Stokes,* L. R. 9 Ch. Div. 72; *Cubitt v. Porter,* 8 B. & C. 257, 2 M. & R. 267.

The following opinion was filed October 28, 1913:

BARNES, J. On the appeal of the defendants it is contended (1) the right exists on their part, without the consent of the plaintiff, to raise the height of the party wall on the south side of the two and one-half foot strip; (2) to inclose such strip to the additional height and use and occupy so much thereof as was not taken up with the stairway; (3) to remove the facing of the party wall and to substitute other material therein, provided the efficiency of the wall was in no way impaired by so doing; (4) to replace the old stairway with a new and better one; and (5) to make the height of the new stairway one foot less than the height of the old one. On all of these propositions except the third and fourth the trial court found adversely to the defendants. The plaintiff on its appeal urges that the court erred in adjudging the right to be in the defendants to build a new stairway, although they were required to build it of the same height and width as the old stairway and of at least equally good material.

The party wall on the south side of the two and one-half foot strip was substantially sixteen inches thick, so that

there was inclosed in the building built by Mrs. Schulver a part of the two and one-half foot strip about fourteen inches in width and twenty-nine and one-half feet in length, excluding end walls. The foundation wall exceeded twenty inches in thickness. The crucial question in the case is, Did the plaintiff's grantors own and does the plaintiff own an undivided one-half of all that part of the building that stands on the two and one-half foot strip? It is conceded that the parties each own a half interest in the soil itself and that it was the intention that the south wall should be a party wall. If the question be answered in the affirmative, such answer settles most of the disputed questions in plaintiff's favor, while a negative answer disposes of most of such questions in defendants' favor. The task of the court is to determine as best it may what the parties intended by their contracts of 1885 and 1908, by reading them in the light of the circumstances which surrounded the parties when they were made. *Barkhausen v. C., M. & St. P. R. Co.* 142 Wis. 292, 298, 124 N. W. 649, 125 N. W. 680; *Shepard v. Pabst,* 149 Wis. 35, 45, 135 N. W. 158. These contracts are not ordinary deeds. They were apparently made in duplicate and signed by all the parties, so that all are bound by the covenants and recitals contained therein. The small part of this fourteen-inch strip which is not used for stairway purposes can be of little value to the plaintiff, but that fact is of no consequence except as it may be helpful in getting at what the parties had in mind. If the defendants are trying to appropriate any property that belongs to the plaintiff, the fact that it may have little value to the latter can furnish no justification for taking it.

The contract of 1885 contained the following:

"And it is further understood and expressly stipulated that the above conveyance carries with it to said first parties [the Huses] the right to pierce the wall now being erected by said second party [Mrs. Schulver] on lands above con-

veyed to said second party by said first parties at such place or places as may be necessary for the purpose of providing means of exit or egress out of or to any building which said first parties may hereafter erect or cause to be erected on said adjoining lands."

It is of some significance that plaintiff's grantors state the rights which they retain in the two and one-half foot strip, and that nothing is said which indicates any intention to reserve or hold any right in that portion of the building which actually inclosed a part of such strip.

The contract of 1908 is more definite. It recites the purpose and intention the parties had in mind when the two and one-half foot strip was conveyed, as follows:

"Whereas, it was the purpose of the conveyance of said strip of land two and one-half by twenty-nine and one-half feet in dimensions, to provide a common stairway for the building then being erected by said party of the first part and any building which might thereafter be erected on said adjoining parcel, and to grant to the owners of said adjoining parcel the right to use said common stairway, which purposes were not fully and clearly expressed in said conveyance of August 13, 1885."

It then proceeds:

"Now, therefore, in order that the rights of the parties hereto may be more fully and clearly defined, and that the real intention of the parties may be carried out, the said party of the first part, in consideration of the sum of one dollar and other valuable consideration to her in hand paid, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said parties of the second part, their heirs and assigns, the right, privilege and easement to use the stairway constructed by said party of the first part, and now existing, in her two-story brick and stone building heretofore erected by her and now standing upon the parcel first above described and upon the said strip two and one-half feet wide by twenty-nine and one-half feet deep, described in said conveyance of August 13, 1885, which stairway is of the width of fifty-four inches between

walls, for all purposes of access to and egress from any building which may hereinafter be erected upon said adjoining parcel last above described, together with the right, as defined in said former conveyance, to pierce the wall erected on the south line of said strip at such place or places as may be necessary for the purpose of providing such access or egress; and does hereby covenant and agree to and with said parties of the second part, their heirs or assigns, to maintain said stairway at all times in good condition and repair at her own expense, and this shall constitute a covenant running with the land and binding upon her heirs and assigns."

These recitals would seem to define pretty clearly the rights which the plaintiff's grantors intended to acquire and hold in the two and one-half foot strip. The purpose of conveying it was said to be to provide a common stairway and to grant the right to use it, and to carry out that purpose Mrs. Schulver granted a right to use the stairway and to pierce the party wall and agreed to keep the stairway in a proper state of repair. The building is referred to as "her" building. If the Huses owned a one-half interest in so much of the stairway as was on the two and one-half foot strip, there was no need of any grant of the right to use this part of the stairway. By expressly enumerating the rights reserved and acquired in the strip, it is a fair assumption that such enumeration was intended to and did cover all rights intended to be reserved or acquired. *Kirch v. Davies,* 55 Wis. 287, 11 N. W. 689. That portion of the fourteen-inch strip which was inclosed but not used for a stairway had been exclusively used by defendant's grantors for twenty-three years when the second contract was made, and nothing was said in the new contract to indicate that the parties did not intend that it should be so used in the future, and it was so used until the defendant bank commenced to rebuild the building. We think that under these contracts the beneficial use of the inclosed portion of the strip in question was conferred upon defendant's grantors, the plaintiff's grantors

reserving an easement in the stairway and the right to gain access thereto by making openings in the party wall. The building was originally built with the consent of all the parties, and they had a perfect right to make such provision as they saw fit regarding its ownership. It was known to all the parties when the first contract was made that Mrs. Schulver intended to build on the strip. The situation of the parties and their surroundings when the contract was made tend to indicate that what the Huses desired to secure and retain was an interest in the party wall with a right to penetrate it and the right to use the stairway and to compel Mrs. Schulver to keep it in repair.

Having reached the conclusion that plaintiff does not own any part of the stairway, but has only an easement therein, it must be also held that the defendant bank had the right to remove and replace the existing stairway with another equally as good or better and located in the same place, unless damage resulted to the plaintiff from making the change. The owner of property subject to an easement has the right to make incidental changes in the real estate over which the easement extends, provided there is no substantial impairment of the right granted. *Low v. Streeter,* 66 N. H. 36, 20 Atl. 247, 9 L. R. A. 271; *Atkins v. Bordman,* 2 Met. 457; *Van O'Linda v. Lothrop,* 21 Pick. 292; *Underwood v. Carney,* 1 Cush. 285; *Burnham v. Nevins,* 144 Mass. 88, 10 N. E. 494; *Grafton v. Moir,* 130 N. Y. 465, 29 N. E. 974; *Chandler v. Goodridge,* 23 Me. 78; *Pomeroy v. Salt Co.* 37 Ohio St. 520; *Duross v. Singer,* 224 Pa. St. 573, 73 Atl. 951. Numerous decisions in our own court relating to the rights of owners of highways over which the public have the right to travel, accord with the rule of law above stated. The owner has the right to cultivate the soil and remove crops from the part of the highway not used by the public and has the right to remove trees standing on the right of way when not necessary for road construction, and

to pile building material thereon, provided the public rights are not interfered with. A partial collection of such cases will be found under the title "Highways" in volume 2 of Simmons's Digest, page 1755. See, also, *Loberg v. Amherst,* 87 Wis. 634, 58 N. W. 1048. The plaintiff has failed to show that he would suffer any damage by reason of building the proposed new stairway or by reason of building it one foot less in height than the old one, and holding as we do that he has only an easement in the stairway, we think it follows as a necessary consequence that the defendants had the right to make the proposed change in the stairway.

Both parties agree, as we understand them, that the wall on the south side of the two and one-half foot strip was intended to be and is a party wall and that they each own an undivided moiety of the land on which it stands. This being the situation, the defendant bank had the right to raise the height of the wall against plaintiff's protest, provided it was of sufficient strength so that it could be raised without injury to plaintiff. There is an unanimity of authority on this proposition that is unusual. See note to *Bright v. Bacon* (131 Ky. 848, 116 S. W. 268) 20 L. R. A. N. S. 386, wherein about twenty cases are cited to the proposition and wherein it is said that there are no cases to the contrary. Additional cases to the same effect are *Cubitt v. Porter,* 8 B. & C. 257, 265; *Wiltshire v. Sidford,* 1 Man. & R. 404; *Campbell v. Mesier,* 4 Johns. Ch. 333. In so far as the case of *Andrae v. Haseltine,* 58 Wis. 395, 17 N. W. 18, is authority on the question at all, it tends to support the doctrine announced in the cases generally.

But it is said that, conceding the right existed to raise the party wall twenty-eight inches, the right did not exist to inclose any part of the two and one-half foot strip over and above what had been inclosed before. We have already stated the rights which we think the plaintiff's grantors intended to acquire and reserve in the building on this strip.

No limitation was placed upon the height of the building in either contract, and it was not even completed when the first contract was made. It is possible that they did not have a keen appreciation of the value of a half interest in the fourteen-inch strip which the parties contemplated would be inclosed in the building, or else did not realize that a small part of it would be available for other than stairway purposes. This space must necessarily be inclosed, else no roof could be placed on the building. The right existed to raise the party wall, if it could be raised without damage to plaintiff. We do not think it was within the contemplation of the parties or that it would be a reasonable construction of their contracts to hold that defendant is irrevocably bound for all time to come to maintain its building at its original height. If it be raised, this space must necessarily be inclosed in it, and we think plaintiff has no other or greater rights in the building as raised than he had in the structure as it was originally constructed. He has the right to use the stairway and pierce the party wall. His grantors have by their contracts and conduct conceded the beneficial use of so much of said strip as is inclosed and neither useful nor necessary for stairway purposes.

In reference to the tearing down of the facing of the party wall so as to construct a granite front and facing, we think the defendant was within its rights. It had the right to repair the party wall, provided plaintiff suffered no damage. There was evidence tending to show that the repair was needed. Such action did not even temporarily deprive plaintiff of the use of the stairway, because he could not use it until he constructed a building. As to the part of the wall which was north of the party wall and on the east line of the two and one-half foot strip, we think it was the property of the defendant and that the defendant could repair or replace it if it saw fit, so long as such repair or replacement did not deprive the plaintiff of the use of the stairway.

To summarize the conclusions reached it is held:

1. Defendant had the right to remove the facing of the party wall and the part of the wall on the front end of the two and one-half foot strip to the north of the party wall, for the purpose of replacing it with newer and more suitable material.

2. It also had the right to remove the old stairway and to replace it with a new one of concrete and marble in conformity with its plans and to make such stairway one foot less in height than the old stairway.

3. It had the further right to raise the party wall twenty-eight inches and to inclose that part of the two and one-half foot strip lying north of the party wall and to use and occupy so much thereof as was neither necessary nor useful for stairway purposes.

4. It is held that the only interest which the plaintiff has in the portion of the building lying north of the party wall is to have a stairway maintained therein substantially like the stairway originally built and the right to pierce the party wall and use said stairway in common with the defendant at any time plaintiff erects a building on the south side of the party wall.

5. It is not intended to be held that, should defendant in the future add one or more additional stories to its building, the plaintiff would not have the right to insist that stairways be built over the present one to reach the additional stories and also the right to pierce the party wall so as to reach such stairways.

6. Neither does the court wish to be understood that conclusions 1 and 2 would have been reached had it been shown that any legal damage would result to the plaintiff therefrom or that the acts in question would constitute any material interference with the use and enjoyment of plaintiff's easement.

*By the Court.*—The judgment is affirmed on plaintiff's

appeal and reversed on the appeal of defendants, and the cause is remanded with directions to enter judgment in accordance with this opinion.

TIMLIN, J., dissents.

A motion for a rehearing was denied, with $25 costs, on January 13, 1914.

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LEWANDOWSKI, Respondent, vs. MCCLINTIC-MARSHALL CONSTRUCTION COMPANY, Appellant.

*October 30, 1913—January 13, 1914.*

*Negligence: Personal injury: Dangerous method of doing work: Tossing heated rivets: Failure to give warning: Questions for jury: Special verdict: Waiver of objections: Appeal.*

1. Plaintiff, a bricklayer not in defendant's employ, while working upon the first floor of the east wing of a building was struck and injured by a heated bolt or rivet. Between the wall at which he was working and the west wing of the building was a court about thirty feet wide. On the seventh story of the west wing defendant's employees were riveting the steel framework. No one else was engaged in that work around the building. The evidence—which showed among other things that the rivets, after being heated to a white heat, were tossed sometimes a distance of seventy-five or eighty feet to a helper who caught them in a pail or bucket, but missed about one in a hundred—is *held* to sustain findings by the jury that defendant ought reasonably to have anticipated that injury might happen from the manner in which the work was done; that it was defendant's duty to warn plaintiff of his danger; and that failure to warn was the proximate cause of the injury.
2. The inference being irresistible that the rivet which struck plaintiff was one heated by defendant's employees, it was not error to refuse to submit that question to the jury.
3. Although the complaint did not set up failure to warn as a ground of negligence, yet the defendant, not having objected to the submission of that question to the jury, cannot on appeal successfully assert that such submission was error.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The defendant company was engaged in constructing the steel and iron work of a building being erected in the city of Milwaukee. Plaintiff, a bricklayer in the employ of Strachota & Sons, mason contractors, was at work upon the same building, and at the time of the injury was on the inside of the wall of the east wing, which wall at that time was built up about three feet from the first floor on which he was standing. The employees of the defendant were working on the seventh floor of the west wing riveting the steel and iron frames. Between the two wings there was a court about thirty feet wide. It was the practice of the man who heated the rivets or bolts to toss them by means of a tongs to the man who did the riveting, and he or his helper caught them in a bucket or pail. The complaint alleged that during this operation one of the rivets or bolts dropped down through the building and struck the plaintiff upon the shoulder. This action was brought to recover damages for injuries sustained. The complaint charged that the defendant performed the work of transferring bolts from where they were heated to the riveter in a negligent manner, and also that the employees of the defendant negligently performed the work. The jury returned a special verdict in which it found (1) that plaintiff was injured by being struck by a riveting bolt; (2) that defendant ought reasonably to have anticipated that injury might happen from the manner in which the work was done; (3) that it was defendant's duty to warn plaintiff of his danger; (4) that failure to warn was the proximate cause of the injury. From a judgment rendered on this verdict the defendant appeals.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *Roger G. Flanders.*

For the respondent the cause was submitted on the brief of *Casimir Gonski.*

The following opinion was filed November 18, 1913:

BARNES, J. The appellant contends that it was error not to allow the jury to say whether the rivet which struck the plaintiff was dropped or thrown by defendant's employees, and also that the court erred in not directing a verdict for the defendant in the first instance, and in not changing the answers to certain questions in the special verdict after it was returned and awarding judgment for the defendant on the verdict as corrected.

The evidence, and the pleadings as well, showed that the defendant was engaged in riveting the iron framework of the building and that such rivets were heated and tossed or passed by the man who heated them to the helper of the riveter, and that occasionally the helper would miss a rivet so tossed and the same would fall, and it further showed that there was no one else engaged in this work around the building. The inference would seem to be irresistible that the rivet which struck the plaintiff was one that was heated by the defendant's employees. Whether there was any negligence in permitting it to drop is another question.

The complaint was framed on the theory that the defendant did its work in a negligent manner that was dangerous to other employees around the building. This ground of negligence was not submitted to the jury, probably because the court thought either that the evidence showed that the defendant was doing its work in the usual and customary manner, or because it thought that in this case there was no evidence to show that the rivet in question dropped because of any negligence on the part of defendant or its servants. The rivet might accidentally drop while the helper was passing it to the riveter, or while the riveter was inserting it in the framework, without any negligence on the part of the employees. The evidence failed to show that the rivet

dropped because of the failure of the helper to catch it when thrown by the man who heated it.

Failure to warn was not set forth as a ground of negligence in the complaint, but was submitted to the jury. The defendant asserts that this is error. No objection was taken to the submission of the question until after the jury had returned its verdict. If such an objection had been made the court would undoubtedly have entertained a motion to amend the complaint, and, if this particular issue had not been fully tried, would have permitted further testimony to be taken thereon. We do not think that the defendant should be allowed to experiment with the jury, but conclude that if it desired to object to the submission of this ground of negligence because not pleaded it should have done so before the jury passed on the question. The defendant was entitled to be apprised of this ground of negligence, if relied on. If it existed, the plaintiff's action should not be defeated because of his failure in the first instance to plead it. The trial court would not hesitate to amend the pleading if necessary, but would permit the defendant to have a fair trial on the issue. Having permitted the question to be submitted without objection, we must assume that the court considered that it had been fully tried.

We also think that the jury was warranted in answering this question as it did. These rivets were in reality iron bolts, which, falling a distance of seventy feet, would acquire considerable momentum, and considering the fact that they were heated to a white heat might well seriously injure any person whom they struck. It is not disputed that after they were heated they were sometimes tossed a distance of seventy-five or eighty feet to the helper, and that the only means he had of catching them was a pail or bucket and that as a matter of fact he would occasionally miss, the evidence showing that about one bolt in a hundred would be missed.

There were a number of gangs of men around the building performing various kinds of work thereon. Any of the men who were working within range of these missiles were liable to be hit and hurt at any time, as well as men who were passing back and forth through the building under where the riveting was being done. It would almost seem that as applied to this building the work was carried on in an obviously dangerous manner. But whether it was or not, the work of the defendant was such that it might at any time result in injury to the other employees about the building. Under these circumstances the jury might well find that it was the defendant's duty to warn employees about the building of the manner in which its work was being done and of the hazard to which they were subjected therefrom. *Olson v. Phœnix Mfg. Co.* 103 Wis. 337, 79 N. W. 409; *Cummings v. C. W. Noble Co.* 143 Wis. 175, 126 N. W. 664, and cases cited. Such employees would then have an opportunity to seek employment elsewhere while the riveting was going on, or to refuse to work in that part of this particular building where they would be subjected to such danger. The plaintiff had been at work where he was injured but a comparatively short time before the injury, and he testified that he had never seen a rivet fall until this particular one struck him. That he was within range of these falling missiles is very evident from the fact that he was struck by one. We cannot assume that somebody deliberately went out of his way to throw the rivet at the plaintiff. We think there is sufficient evidence in the record to sustain the findings of the jury and that the judgment should therefore be affirmed.

*By the Court.*—Judgment affirmed.

A motion for a rehearing was denied, with $20 costs, on January 13, 1914.

RICKETSON and another, Respondents, vs. CITY OF MILWAUKEE, imp., Appellant.

*October 30, 1913—January 13, 1914.*

***Municipal corporations: Sidewalks: Repairing and relaying: Milwaukee city charter: Board of public works: Powers: Pleading.***

1. **In sec. 16, ch. VII, Milwaukee City Charter, which imposes upon the board of public works the duty "to cause the streets, alleys and sidewalks in the city to be kept in proper repair and in a cleanly and wholesome condition," the further provision empowering said board "to cause sidewalks to be repaired, or to be taken up and relaid with new materials, or with part new and part old materials," etc., refers only to walks which are out of repair.**
2. **In an action to restrain collection of a special assessment for constructing new sidewalks, allegations that the sidewalks which were taken up were "good, safe, and sufficient sidewalks, in repair and at proper grade and of required size, free from any danger to persons passing over the same," admitted by demurrer, show that the board of public works had no power under said sec. 16 to build the new walks.**

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This action was brought to restrain the collection of a special assessment against fifteen lots belonging to the plaintiffs, which assessment was levied for the expense of constructing cement sidewalks amounting to $662.42. The material parts of the city charter involved in this controversy are secs. 16 and 17, ch. VII, and are as follows:

"Section 16. It is hereby made the duty of the board of public works, with the consent of the aldermen of the proper ward, unless otherwise provided by ordinance of the common council, to cause the streets, alleys and sidewalks in the city to be kept in proper repair, and in a cleanly and wholesome condition at all times, and for this purpose they are empowered, with the consent of the aldermen of the ward in which such street, alley or sidewalk is located, to employ the necessary labor, or to contract pursuant to law, for such cleaning

and repairing as they may deem necessary for the safety and health of the people, the expense of such cleaning and repairing, except of sidewalks, shall be chargeable to and paid out of the fund of the ward in which such work is done; and the said board is also hereby empowered to cause sidewalks to be repaired, or to be taken up and relaid with new materials, or with part new and part old materials, and to be restored to grade, and to assess the expense thereof against the lot or piece of land in front of which such work may be done, in the manner provided by section 19 of said subchapter VII of said chapter 184 of the Laws of 1874."

"Section 17. Whenever any sidewalk or part of any sidewalk shall, in the judgment of said board, declared by resolution to that effect, be in a dangerous condition to persons passing over it, for want of being repaired or remade, or on account of being above or below the grade established by the common council, the said board shall have power to order the same to be forthwith repaired or remade, and thereupon forthwith to employ fit persons to repair or remake the same for a fair price, and charge the expense thereof to the lots, parts of lots, or parcels of land abutting thereon, by a special assessment; and such assessment shall be a valid charge and lien upon such lots, parts of lots or parcels of land, without any estimate, notice, letting or other proceeding preliminary to the doing of such work, except the resolution of said board so declaring such sidewalks to be dangerous."

The complaint sets forth the interest of the plaintiffs in the property in question; the corporate existence of the city of *Milwaukee;* that William H. Graebner is treasurer and as such charged with the collection of taxes; that all the lots in question are vacant except one and are situate in an outlying resident part of the city of *Milwaukee;* the location of the lots on the streets;

"That on September 7, 1907, and for many years prior thereto, and subsequent to said date, up to the time hereinafter alleged, when the board of public works of the city of *Milwaukee* caused the same to be torn up, the plaintiffs were maintaining, in front of all of said lots on Homer and Graham streets, and the same were good, safe and sufficient side-

walks, in repair and at proper grade and of required size, free from any danger to persons passing over the same.

"The plaintiff further alleges on information and belief that on or about September 7, 1907, the board of public works of said city, without any notice whatsoever to the plaintiffs, ordered, instructed and directed the ward superintendent of the Seventeenth ward of the city of *Milwaukee* to cause the wooden walks in front of all of said lots, so maintained by these plaintiffs, to be pulled up and cement walks to be laid in their stead, upon the pretense that said walks were defective, dangerous and not at proper grade; that within a short time thereafter the said superintendent did, without any notice to this plaintiff, cause the said wooden sidewalks in front of all of said lots to be pulled up and cement walks laid in their place in front of all of said lots at a total cost of $662.43; that the cost of said walk in front of each particular lot was as follows, to wit:" [Here follows a description of the property and amounts assessed to each lot.]

"That the board of public works did thereupon charge the said cost of construction of said cement sidewalks to the said several lots and did cause steps to be taken whereby the plaintiffs' above described property was, in form, specially assessed for the entire cost of said work as follows:" [Here follows description of property and amounts assessed.]

"That said pretended special assessments against the said several lots were thereafter, by the officers of the defendant city, placed upon the tax roll of said city for 1907, as a special assessment and tax against said property in the following amounts, to wit:" [Here follows description of property and amounts assessed.]

The complaint further alleges that the proceedings of the board are arbitrary, unreasonable, and without authority of law, and that no resolution declaring that the walks were in a dangerous condition or above or below grade was passed; that the board did not view the premises, and that the sums charged against the lots were excessive and more than the sidewalks were worth; that no notice was given to plaintiffs at any stage of the proceedings; that the board pretended to

act under sec. 17, ch. VII, of the charter; that the proceedings of the board were illegal and void; that the plaintiffs have paid all taxes on said lots for 1907 except the special taxes referred to herein, and are ready and willing to pay them or such part as may legally and justly be assessed and taxed against said lots; that the tax roll is in the hands of the defendant city treasurer for collection and he is threatening to collect.

The prayer of the complaint is that the assessment be declared void and the defendants restrained from selling said lots and collecting the taxes, and for general relief. The defendants demurred to the complaint for want of facts sufficient to constitute a cause of action. The demurrer was overruled with leave to answer, and from the order overruling it this appeal was taken.

For the appellant there was a brief by *Daniel W. Hoan*, city attorney, and *Clifton Williams*, special assistant city attorney, and oral argument by *Mr. Williams*.

For the respondents there was a brief by *Otjen & Otjen*, and oral argument by *Henry Otjen*.

KERWIN, J. It is insisted by appellant that the sidewalk in question was built under sec. 16, ch. VII, of the city charter, being ch. 184, Laws of 1874 as amended, while on the part of the respondents it is insisted that it was built under sec. 17, ch. VII, of the city charter. The complaint clearly shows that the provisions of sec. 17 were not complied with, in that no resolution was passed to the effect that the sidewalk was in a dangerous condition, and moreover that the walk was not built at a fair price, and that at the time the sidewalk was built the plaintiffs were in fact maintaining in front of the lots in question a good, safe, and sufficient sidewalk, in repair and at proper grade and of the required size, and free from any danger to persons passing over it. But the appellant insists that the board of public works had the

right, under sec. 16, ch. VII, of the city charter, to construct a new sidewalk of different material without any resolution declaring the walk to be in a dangerous condition as provided in sec. 17, and therefore the complaint fails to state a cause of action.

The contentions made involve the construction of said secs. 16 and 17. We are asked by counsel for appellant to construe sec. 16, since it is important that the city should be informed of its rights in view of the extensive sidewalk improvements which are constantly going on in the city.

If the action of the board was authorized under either section the complaint states no cause of action, and the demurrer must be sustained. If the board of public works has the right to take up a wooden sidewalk which is in good condition and repair and put down a cement walk and charge the expense of such new walk to abutting owners, then the complaint states no cause of action.

There can be no doubt that the board had no jurisdiction to build the walk under sec. 17, because that section requires, as a condition precedent to the building of the walk, a resolution as therein provided, and the complaint alleges that no such resolution was passed. It therefore becomes necessary to inquire whether the allegations of the complaint negative the right of the board to build under sec. 16. True, no resolution is required under sec. 16, and the question arises whether the power and authority of the board to take up existing walks and build new walks is absolute and without limitation, or whether the board has the power to rebuild or repair only in case the walk is out of repair or defective.

Secs. 16 and 17, ch. VII, as they appear in the charter of the city of *Milwaukee* (ch. 184, Laws of 1874), have been changed by amendment. Sec. 16 as originally written in the charter provides for keeping sidewalks in repair, and that it shall be the duty of the board of public works, unless otherwise provided by ordinance, to cause the streets, alleys,

and sidewalks in the city to be kept in proper repair and in a cleanly and wholesome condition, and for that purpose it is empowered to employ the necessary labor or contract pursuant to law for such cleaning, and the expense of cleaning and repairing, except of alleys and sidewalks, is to be paid out of the general fund; and the board is also empowered to cause sidewalks to be repaired or to be taken up and relaid with part new and part old materials of the kind previously laid down, and to assess the expense thereof against the lot or land in front of which such work may be done. The section further provides for notice to the owners that the repairs are necessary and describing the work to be done, and that the persons interested can make such repairs within a certain time, and that after such time such work will be done by the board of public works and the expense assessed against the lots, and contains other provisions for the doing of the work. Sec. 17 as originally written in the charter provides for repairing or remaking sidewalks in case they are in a dangerous condition and so declared by resolution without notice or other proceeding.

Sec. 16 was changed by the legislature in 1875 by providing that the expense of cleaning and repairing, except of sidewalks, shall be chargeable to and paid out of the fund of the ward in which such work is done.

Sec. 17 was amended by sec. 5, ch. 311, Laws of 1876, by inserting after the word "remade" in the fifth line of said section the words "or on account of being above or below the grade established by the common council." Sec. 21 of ch. 324, Laws of 1882, amended said sec. 16 by providing that urgent repairs of sidewalks which can be made at a cost not exceeding $3 for any fifty lineal feet of said walk may be made without giving any notice and without any previous order or resolution, and the expense be charged to the lots, and further amended the section by not limiting the material

used in relaying of sidewalks to the kind previously laid down.

The next amendment was by ch. 388, Laws of 1889, vol. 2, p. 892, which amendment left said sec. 16 as it now stands. The history of sec. 16 from its enactment in 1874 down to the present time shows quite clearly that the primary power conferred upon the board was to keep streets clean and sidewalks in repair. It provides that it is made the duty of the board, with the consent of the aldermen of the proper ward, unless otherwise provided by ordinance of the common council, "to cause the streets, alleys and sidewalks in the city to be kept in proper repair, and in a cleanly and wholesome condition at all times . . . ; and the said board is also hereby empowered to cause sidewalks to be repaired, or to be taken up and relaid with new materials or with part new and part old materials. . . ."

It seems quite clear that this section confers no power to interfere with a sidewalk unless it is out of repair. Manifestly the power given to take up and relay with new material or with part new and part old material refers to walks out of repair, and does not empower the board to tear up a sidewalk which is in good repair and replace it with a new walk. So it follows that if the sidewalk was in good repair the board had no power to tear it up and replace it by a new walk and charge the expense to the lots in question.

As we have seen, sec. 16 as it existed before amendment required notice to the lotowners and opportunity to repair before the board could act, and provision for emergency was made in sec. 17 in case the walk was in a dangerous condition. By amendment slight repairs were allowed under sec. 16 without notice to lotowners, and later amendment swept away all provisions as to notice and left sec. 16 in its present condition and the board free to repair and relay walks without notice. But there is no intimation in the sec-

tion as it stood originally or by amendment indicating that any power was conferred upon the board to build a new walk when the existing walk was in good repair. Doubtless a very broad discretion is vested in the board in determining whether a walk is in good repair or not. But in the instant case the complaint alleges among other things that the sidewalks were "good, safe and sufficient sidewalks, in repair and at proper grade and of required size, free from any danger to persons passing over the same." These allegations are admitted by the demurrer and show that the board had no power to build the walks in question, and hence the complaint states a good cause of action and the demurrer was properly overruled.

We are cited by counsel for appellant to *Abbot v. Milwaukee,* 148 Wis. 22, 134 N. W. 136, as being in point. True, that case deals with said secs. 16 and 17, ch. VII, of the city charter and holds that no narrow construction should be given them, but the point here involved was not involved there. It was there held that a separate contract was not required to be let for each sidewalk to be rebuilt, but that the work might be done under an omnibus contract, and also that a defective wooden walk might be replaced with a cement walk; and further that under said sec. 17 the resolution need not specifically state that it is "the judgment of the board" that such dangerous condition exists, nor is it essential that the board should personally examine the sidewalk condemned.

*By the Court.*—The order appealed from is affirmed.

TIMLIN, J., dissents.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY vs. ADAMS, Appellant, and another, Respondent.

*November 18, 1913—January 13, 1914.*

***Life insurance: Assignment of policy: Vested rights: Husband and wife.***

1. **The vested property right which a husband had in a policy of insurance issued prior to the enactment of ch. 376, Laws of 1891, upon his own life for the benefit of his wife, could not be taken away by that statute.**
2. **Where such a policy was a Wisconsin contract, governed as to its validity and effect by the laws of Wisconsin, an assignment thereof executed by the husband while both he and the assignee, though domiciled elsewhere, were temporarily in Minnesota, was not invalid merely because in that state the law is settled (contrary to the Wisconsin rule) that a life insurance policy belongs to the beneficiary alone and cannot be assigned by the assured. The state of Minnesota has not forbidden a person to assign a policy which, under the *lex loci contractus*, is his property.**

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

This is an action of interpleader. The question involved is as to the ownership of the proceeds of a life insurance policy on the life of one Foster D. Adams. The policy was issued June 21, 1881, and named as beneficiary "his wife, *Ida M. Adams.*" The insured then lived in the territory of Dakota, and the policy stated on its face that it was a contract made and to be performed in the state of Wisconsin. In November, 1893, a judgment of divorce was rendered by the district court of Hennepin county, Minnesota, dissolving the bonds of matrimony between Foster D. Adams and *Ida M. Adams,* and requiring Foster D. Adams to pay $1,250 in full settlement of all pecuniary obligations. *Ida M. Adams* thereafter married Charles F. Lincoln, and is the respondent in this action.

Foster D. Adams died at Minneapolis, Minnesota, June 22, 1911. Two or three days before his death he executed to the appellant, *William E. Adams,* an assignment of the policy and delivered the same to the appellant, together with the policy itself. The insurance company brought the money into court, and the trial court adjudged that it be paid to the respondent, *Ida M. Lincoln,* from which judgment *William E. Adams* appealed.

For the appellant there were briefs by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and oral argument by *Jackson B. Kemper.*

For the respondent there was a brief by *McClellan, Hensel & Guthrie* and *George H. Katz,* and oral argument by *Mr. F. F. McClellan* and *Mr. Katz.* They contended, *inter alia,* that the validity of the assignment is governed by the laws of Minnesota. The assignment is a separate contract from the policy. The insurance contract is silent as to what law shall govern the assignment, and consequently the validity of the assignment is governed by the law of the state where made. *Union Central L. Ins. Co. v. Woods,* 11 Ind. App. 335, 37 N. E. 180; *Lee v. Abdy,* L. R. 17 Q. B. D. 309; *Mutual L. Ins. Co. v. Allen,* 138 Mass. 24, 52 Am. Rep. 245; *Miller v. Campbell,* 140 N. Y. 460, 35 N. E. 651; *Brick v. Campbell,* 122 N. Y. 337, 25 N. E. 493; *Spencer v. Meyers,* 150 N. Y. 269, 44 N. E. 942; *Russell v. Grigsby,* 168 Fed. 577, 94 C. C. A. 61. By the law of Minnesota this assignment was void. *Wallace v. Mutual B. L. Ins. Co.* 97 Minn. 27, 106 N. W. 84; *Allis v. Ware,* 28 Minn. 166, 9 N. W. 666; *Birge v. Franklin,* 103 Minn. 482, 115 N. W. 278; *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 193, 6 N. W. 771.

WINSLOW, C. J. Two questions are raised in this case, viz.: (1) Was the husband's right to assign the policy taken away by ch. 376 of the Laws of 1891? and (2) Was the assignment in question void because executed in Minnesota?

The first question is answered in the negative by the decision in the case of *Boehmer v. Kalk, ante,* p. 156, 144 N. W. 182, and need not be further elaborated upon here.

The second question demands careful examination. The policy in question was issued at Milwaukee and was payable by its terms at Milwaukee. Moreover it contained an express statement that it was a contract made and to be performed in the state of Wisconsin. There can be no doubt, therefore, that it was a Wisconsin contract, although both the insured and the beneficiary resided in Dakota. *Presbyterian M. Fund v. Thomas,* 126 Wis. 281, 105 N. W. 801. But it was assigned and delivered to the appellant in the state of Minnesota, and in that state the law is settled (contrary to the Wisconsin rule) that such a policy belongs to the beneficiary alone and cannot be assigned by the assured because he has no legal or equitable interest in it. *Birge v. Franklin,* 103 Minn. 482, 115 N. W. 278. The contention is that the assignment is void because executed in a state where the law does not recognize that the assured has any right to make such an assignment.

That the question is one involved in some difficulty must be admitted. That field of law which goes by the name of the conflict of laws is one of the most thorny and difficult fields to traverse. It is full of conflicting decisions, refined reasoning, and unsatisfactory results. Especially is this the case when the subject under consideration is a mere chose in action.

Approaching the question from the *a priori* standpoint, it would seem as if the laws of Minnesota could have no effect on the matter at all. The contract of insurance was from the beginning a Wisconsin contract and governed as to its validity and effect by the laws of Wisconsin. By those laws it became the property of the deceased when it was issued and remained his property notwithstanding the subsequent change of law in Wisconsin. *Boehmer v. Kalk, supra.* That

this vested property right could be divested or impaired even temporarily by the fact that the deceased was physically in Minnesota, whether for a long or short period of time, seems a proposition quite at variance with the principles usually applied to property and property rights; yet this is practically the position which the respondent must and does assume to sustain the judgment, and authorities are cited which seem at first glance to support it.

Before proceeding to consider these authorities it will be desirable to state the exact facts appearing in the record which have a bearing on the question. As before stated, the contract of insurance was purely a Wisconsin contract. At the time of its execution and delivery the insured and the beneficiary were residents of the territory of Dakota. In November, 1893, at the suit of the deceased, Foster D. Adams, a decree of divorce was granted by the district court of Hennepin county, Minnesota. This would seem to be *prima facie* proof that he then resided in that state. The assignment bears date February 11, 1908, at Omaha, Nebraska, and runs to his brother, the appellant, a resident of Deadwood, South Dakota. It was not delivered until about June 19, 1911, three days before the death of the insured and when both he and his brother were at the house of a sister in Minneapolis, Minnesota. There is no finding as to the residence or domicile of the insured after the divorce in 1893. The evidence, however, shows without dispute that for some time prior to February, 1911 (for what length of time does not appear), the insured was manager of the southern division of the American Express Company and remained such manager until his death, with his headquarters at St. Louis, Missouri; that he was ill and not in active duty from February, 1911, until the time of his death in the following June; that during that absence he was at Los Angeles, California, for a part of the time and a part of the time at Monrovia, a suburb of Los Angeles. At this last named place his

sister (at whose home he died) and his brother, the appellant, were with him, and all three went to Minneapolis together a week or ten days before the death of the insured, and apparently in anticipation of that death. During this time the insured telegraphed to St. Louis for his private papers, including this policy, and was apparently arranging his business affairs, and as part of that arrangement delivered the assignment and the policy to his brother, the appellant, who was still a resident of South Dakota, and who took the policy and assignment with him to that state after the death of the insured. The conclusion seems irresistible that the insured was not domiciled in nor a resident of Minnesota at the time of his death, but was there merely temporarily that he might have the care of his sister in his illness. The case, therefore, is the case of the assignment of an insurance policy by an assignor domiciled in Missouri to an assignee domiciled in South Dakota, which was delivered while both assignor and assignee were temporarily in Minnesota. The authorities, therefore, which hold that the validity and effect of an attempted assignment of an insurance policy in favor of a married woman is determined by the law of the domicile of the parties have no tendency to support the judgment because the beneficiary was no longer the wife of the insured and neither of the parties to this assignment was domiciled in Minnesota, and the case is barren of proof as to the state of the law on the subject either in Missouri or South Dakota.

The fundamental principle upon which the line of cases just referred to rests is the principle that any sovereign state may regulate the conduct of its own residents within its limits; that marriage is a status, and that the parties to that status, so far as their ability to contract is concerned, are subject to the regulations and disabilities imposed upon them by the laws of the state of their domicile. *Freeman's Appeal,* 68 Conn. 533, 37 Atl. 420; *Colburn's Appeal,* 74 Conn. 463, 51

Atl. 139; *Mutual L. Ins. Co. v. Allen,* 138 Mass. 24; *Wilde v. Wilde,* 209 Mass. 205, 95 N. E. 295; *Spencer v. Myers,* 150 N. Y. 269, 44 N. E. 942; *Miller v. Campbell,* 140 N. Y. 457, 35 N. E. 651; *Union Cent. L. Ins. Co. v. Woods,* 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; *Henry v. Thompson,* 78 N. J. Eq. 142, 78 Atl. 14; *Newcomb v. Mutual L. Ins. Co.* 18 Fed. Cas. 47.

The English case of *Lee v. Abdy,* L. R. 17 Q. B. D. 309, which is cited in many of the American cases, is a good illustration of the principle. In that case an English insurance company had insured the life of a married man, and the insured and his wife became thereafter permanently domiciled in Cape Colony, where by express legal enactment a husband could not legally assign a policy of insurance to his wife. Nevertheless while he and his wife were so domiciled he formally assigned the policy to her, and on his death she sued the company. It was held in effect that the parties to the assignment were domiciled and made their contract of assignment in Cape Colony, and that the law of Cape Colony and not of England must determine the validity of that contract. Of similar tenor are the Canadian cases of *National T. Co. v. Hughes,* 14 Manitoba, 41, and *Toronto G. T. Co. v. Sewell,* 17 Ont. Rep. 442.

This power of a sovereign state to regulate the conduct of its own residents within its borders and to prescribe limitations or disabilities upon their liberty of contract is not in question here. The state of Minnesota has not attempted to do anything of that kind. It has not forbidden a husband to dispose of any property which by virtue of the *lex loci contractus* he may have in a life insurance policy. It has simply said that a husband has no property in a policy of the kind in suit where the interpretation and legal effect of the policy are governed by the law of Minnesota. In other words, it has said, if the policy in question were a Minnesota contract F. D. Adams could not assign it because he has no

property in it. Here is no condemnation of the act of transferring property nor any declaration that such a transfer is against public policy or good morals, but simply a construction of a certain form of contract and a declaration of the legal effect thereof when it occurs in a contract which is properly to be construed and interpreted according to the law of Minnesota.

Had it been specifically declared by the legislature of Minnesota that an assignment of such a policy by the husband was against public policy and prohibited, or should not be valid unless accompanied by certain formalities not present in this case, we should have a different question here, a question somewhat similar to the questions arising in *Russell v. Grigsby,* 168 Fed. 577, and *Miller v. Manhattan L. Ins. Co.* 110 La. Ann. 652, 34 South. 723, but we have no such case.

It is sometimes said in the text-books and in the opinions that an assignment of a policy is governed by the law of the place where the assignment is made. 25 Cyc. 780. This is generally true in the sense that it is competent for the state to prescribe formalities for the transfer within its borders of a chose in action like the present, even though it be a contract made in another state, and that these requirements will generally be given effect. It is true in the sense that the *lex loci* may make a chose in action assignable which was not assignable by the law existing where the contract was made and is to be performed.

It is certainly true in the general sense that a contract valid where made will be valid in another jurisdiction unless contrary to good morals or the public policy of the other jurisdiction. *Mowry v. Crocker,* 6 Wis. 326; *Smith v. C. & N. W. R. Co.* 23 Wis. 267.

Were this an assignment of a policy whose meaning and effect were subject to determination by the law of Minnesota, an assignment by the husband in Minnesota or elsewhere would be worthless, not because it was unlawful but

because the husband has no interest to assign. Being an assignment of a policy whose meaning and effect is to be determined by the law of Wisconsin, it is valid even though executed in Minnesota, because Minnesota has no law, either written or unwritten, which even attempts to prohibit a person from assigning a chose in action which belongs to him.

Rule 141 of Dicey's Conflict of Laws seems to be applicable and is as follows:

"An assignment of a movable which cannot be touched, *i. e.* of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt), is valid. Provided that (1) the liabilities of the debtor are to be determined by the law governing the contract between him and the creditor, (2) the right to recover the debt is, as regards all matters of procedure, governed by the *lex fori.*"

The case of *Lebel v. Tucker,* L. R. 3 Q. B. Cas. 77, fully sustains this rule. In that case a negotiable bill of exchange drawn, accepted, and payable in England was indorsed by the payee in France and an action brought by the indorsee against the acceptor in England. The defense was that the indorsement was void because, though sufficient under the general law merchant, it lacked certain formalities required by the law of France, and it was held that the original contract could not be thus varied by the law of a foreign country through which it passes. See *Kelly v. Selwyn,* [1905] L. R. 2 Ch. Div. 117; *In re Maudslay,* [1900] L. R. 1 Ch. Div. 602.

We have just held in another case that a law of this state cannot take away the property right which a husband has in a policy of this nature issued prior to the passage of the law. *Boehmer v. Kalk, ante,* p. 156, 144 N. W. 182. Now in the present case it cannot be doubted that Foster D. Adams owned this policy at the time of its issuance in 1881 and thereafter so long as he was a resident of South Dakota. Could it be possible that his property right could be taken

from him and vested in his wife by a subsequent removal into the state of Minnesota? If so, then a decision of the supreme court of Minnesota which had no bearing or effect on the policy when issued could at a later period become effective to convey the property of the husband to the wife and thus accomplish what the legislature of Wisconsin is held to be unable to do.

*By the Court.*—Judgment reversed, and action remanded with directions to enter judgment for the appellant in accordance with this opinion.

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BOARD OF SCHOOL DIRECTORS OF SCHOOL DISTRICT NO. 3, TOWN OF LAKE, Respondent, vs. KUHNKE and another, Appellants.

*November 21, 1913—January 13, 1914.*

*Schools and school districts: Bond of treasurer: Breach: Action, in whose name prosecuted: Liability of sureties: Treasurer holding over after term.*

1. An action for breach of the bond of a school district treasurer should be prosecuted in the name of the district; but the fact that the action was brought in the name of the district board does not constitute prejudicial error.
2. A school district treasurer who duly qualified as such for one term, and upon re-election failed to give a new bond but acted as treasurer thereafter until his death, continued to be treasurer *de facto* and *de jure* during that time, under the provision in sec. 443, Stats. 1911, that the treasurer shall hold his office until his successor be elected or appointed and qualified.
3. The sureties on such treasurer's bond for his first term were, however, held only until the expiration of that term and for such further time as was reasonably necessary for the election and qualification of his successor.
4. Where, at the end of his first term, such treasurer had in his hands a certain amount of school moneys, there was no breach of his bond by reason of his failure to pay over that amount

**to some other person, since he himself was entitled to hold it until his successor qualified; and where he thereafter, while continuing to act as treasurer, rightfully paid out a much larger amount of school moneys, there was no breach for which the sureties on the bond for his first term were liable, although at his death there was a shortage in the funds in his hands.**

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

This is an action against the sureties upon the official bond of a school district treasurer to recover for an alleged breach thereof. The facts were not seriously in dispute. One John F. Peterson (the principal in the bond in suit, but now deceased) was elected treasurer of the plaintiff school district on the first Monday in July, 1905. He gave the bond in suit conditioned as required by statute in June, 1906, and the bond was approved and filed as provided by sec. 443, Stats. 1911. Peterson acted as treasurer thereafter and was re-elected on the first Monday of July, 1908. On the day preceding that election an auditing committee appointed on June 30th, together with the school district officers, examined the books and vouchers of the treasurer, and ascertained that the amount which appeared to be in his hands as treasurer was $1,299.70. Mr. Peterson was present and participated in the examination and made no objection to the result, but tacitly admitted that it was correct. No inquiry was made as to where the money was or whether it was all in the treasurer's hands, and there is no evidence on the subject in the case. Peterson gave no new bond, but continued to act as treasurer until February, 1911, when he died. During this time he received about $9,000 of school moneys from the town treasurer and disbursed in paying proper expenditures nearly $7,700. At the time of his death it appeared by his books that there should have been in his hands as treasurer $2,615.64, but he was in fact insolvent and had only $423.57 in the bank to his credit as treasurer, which sum has been

paid to the plaintiff district. The complaint demanded judgment for $2,192.07, being the deficiency at the time of Peterson's death, but the court entered judgment for $1,299.70 with interest from July 13, 1908, and the defendants appeal.

For the appellants there was a brief by *N. L. Baker & W. J. Zimmers,* and oral argument by *Mr. Baker.*

*John H. Paul,* for the respondent.

WINSLOW, C. J. The action should have been brought in the corporate name of the district, viz. "School District Number Three of the Town of Lake." Sec. 417, Stats. 1911. The error in the title of the action, however, is not substantial. The district board is made up of the director, the treasurer, and the clerk (sec. 432, Stats. 1911), and it is the duty of the director to prosecute actions for breach of the treasurer's bond "in the name of the district." Sec. 442, Stats. 1911. A recovery in the name of the district board instead of in the name of the district itself would unquestionably bar any second action for the same breach, hence the inaccuracy of the name is not prejudicial.

The trial judge held that, notwithstanding Peterson's failure to give a new bond after his re-election in July, 1908, he continued to be treasurer until his death, under that clause of sec. 443, Stats. 1911 (as construed by *State ex rel. Wheeler v. Nobles,* 109 Wis. 202, 85 N. W. 367), which provides that the treasurer shall hold his office until his successor be elected or appointed and qualified. We see no reason to doubt the correctness of this conclusion. He also held, under *Supervisors v. Kaime,* 39 Wis. 468, and *Fond du Lac v. Moore,* 58 Wis. 170, 15 N. W. 782, that the liability of the sureties "goes no further than as to the $1,299.70 in his hands in July, 1908."

Upon these premises the judge concluded that the sureties could not be held for the deficit existing at the time of Peter-

son's death, but must be held for the $1,299.70 in Peterson's hands in July, 1908, because "the breach occurred when, by the failure to file his new bond within ten days after his re-election, July 3, 1908, his office became vacant and he then failed to pay the amount of $1,299.70 to some person lawfully entitled to receive it." We have been unable to see how this conclusion can be logically reached. If, as the court held (and rightly held under the doctrine of *State ex rel. Wheeler v. Nobles, supra*), Peterson remained treasurer until the time of his death, he was the man and the only man entitled to hold the moneys of the district during that entire time. There was no person lawfully entitled to receive or hold those moneys for the district except himself. No other officer or board has a right to hold a dollar of the moneys of the district except the treasurer. Sec. 444, Stats. 1911. There is no logical escape from the conclusion that there was no breach of the bond by reason of his neglect to pay over the amount in his hands in July to some other person, for the very good reason that there was then no person entitled to receive the money from him, but on the contrary he was entitled to hold it himself until his successor was elected and qualified.

Under the decisions in *State ex rel. Wheeler v. Nobles, supra,* and *Supervisors v. Kaime, supra,* Peterson was *de facto* and *de jure* treasurer during the entire time which he acted, but the sureties upon the bond in suit were only held until the expiration of Peterson's term in July, 1908, and for such further time as was reasonably necessary for the election and qualification of his successor. Such successor should have been appointed by the remaining members of the district board at the expiration of ten days after Peterson's election, when it appeared that he had failed to file a new bond. Secs. 433, 443, Stats. 1911.

No such appointment was made and so Peterson rightly held over, under the doctrine of the *Nobles Case,* but that fact

did not extend the obligations of the bond beyond the reasonable time aforesaid, and that time had long expired before any breach of the bond is shown to have taken place,—in fact, the only breach shown is the breach which occurred at Peterson's death, more than two years afterwards. During those years Peterson had rightfully paid out nearly $8,000 of school moneys. Thus it is rendered certain that long before this breach occurred he had paid out far more than the sum of $1,299.70, which was presumptively in his hands in July, 1908, when he entered on his last term and should have furnished a new bond.

In any view of the case we have been unable to perceive how the sureties can be held liable.

*By the Court.*—Judgment reversed, and action remanded with directions to dismiss the complaint.

TIMLIN, J., dissents.

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LAUN and another, Appellants, vs. KIPP, Respondent.

*November 21, 1913—January 13, 1914.*

*Pleading: Sufficiency of complaint: Fraud, how alleged: Equity: Restraining enforcement of judgment: Jurisdiction: Courts: Fraud, intrinsic and extrinsic: Trusts and trustees: Evidence.*

1. In testing a complaint for sufficiency all facts expressly alleged and all reasonably inferable from the whole pleading as well, giving to the language thereof the most liberal construction in favor of the plaintiff which it will reasonably bear and without necessary reference to the prayer, are to be regarded as stated; the ultimate question being, does the pleading, viewed as indicated, show the rights of plaintiff to have been remediably invaded or a wrong in that regard to be remediably threatened.
2. The rule that fraud must be pleaded by a statement of the facts constituting the fraud and that an allegation that a particu-

lar act was fraudulent is not sufficiently precise and definite, is subordinate to the foregoing rule and the one that mere indefiniteness does not go to sufficiency.

3. If the term "fraudulent" or "fraudulently" is used in a pleading in such a way as to state facts in legal effect, so that with its context the subsidiary facts are reasonably inferable, the charge of fraud is to be regarded as sufficiently pleaded as regards a general demurrer, though the pleading may be open to a motion to make more definite and certain.
4. Previous decisions to the effect that to allege an act to have been fraudulently done does not tender an issue of fact for want of precision and definiteness, but is a mere conclusion of law, must be restrained to the now recognized spirit of the Code requiring obvious matters of mixed law and fact, when pleaded in their legal effect, to be regarded as matter of fact, and all facts reasonably inferable from a pleading, resolving all reasonable doubts in favor of the pleader, to be deemed sufficiently stated, upon a challenge for insufficiency.
5. An independent action to prevent the enforcement of a judgment because of happenings after its rendition, by a practice so settled as to be regarded jurisdictional, cannot be maintained in the same or any other court, the remedy being confined to proceedings by motion in the original action.
6. Equity having properly acquired jurisdiction to restrain the enforcement of a judgment upon the ground of its being unconscionable *ab initio*, it may deal with the subject of whether such judgment should not be enforced because of happenings subsequent to its rendition where the later wrong, perpetrated or threatened, is germane to that characterizing the judgment originally.
7. As a general rule, any fact which clearly proves it to be against conscience to execute a judgment and of which the injured party might have availed himself in the original action, but was prevented by fraud or accident unmixed with any fault or negligence of himself or his agents, will justify an application to a court of chancery to prevent such execution.
8. The rule above stated is one of judicial policy applicable to all ordinary situations and not one of limitation of judicial power,—the power itself being as broad as the maxim "There is no wrong without a remedy."
9. The public policy requiring the general rule to be as stated, does not militate against the power of equity going further in exceptional situations where the ends of justice clearly require it.
10. No rule can be formulated setting a definite boundary beyond which a court of equity cannot go as matter of power, or will

not go under any circumstances, as matter of sound public policy, in preventing the enforcement of an unconscionable judgment.

11. The fraud which will justify a court of equity in preventing the enforcement of an unconscionable judgment may be intrinsic as well as extrinsic,—the test being, not the nature of the fraud, but the injustice of wrongfully impoverishing one for the enrichment of another.

12. Though equity may restrain enforcement of a judgment which is unconscionable because of fraud intrinsic as well as fraud extrinsic, whether the court should interfere in such cases being matter of wise administration rather than of power, fraud of the latter kind would call successfully for judicial interference in circumstances where fraud intrinsic would not.

13. Where a person occupies trust relations to another it is his duty to speak whenever the interests of such other would otherwise be prejudiced; he cannot legally or equitably, remain silent and secure to himself an advantage over such other.

14. In case of a person sustaining the relation of trustee to another, he owes to such other the duty of making a full disclosure of all matters appertaining to the trust, and neglect to do so to such other's injury, knowing or having good reason to believe that silence will so result, is a fraudulent act and the duty exists independently of inquiry in judicial proceedings, and failure of the trustee in that regard, persisted in in judicial proceedings to the prejudice of such other and advantage to himself, may be regarded as fraud extrinsic under the rule in *U. S. v. Throckmorton*, 98 U. S. 61, as well as fraud intrinsic.

15. In case of a judicial remedy in equity being invoked to prevent the enforcement of a fraudulent judgment, the rule that facts relied upon for a recovery on the ground of fraud must be established by clear and satisfactory evidence applies and with considerable emphasis.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

Action to restrain enforcement of a judgment because of its being inequitable.

This is the substance of the complaint: In an action for specific performance, in the circuit court for Milwaukee county, Wisconsin, wherein the defendant herein was plaint-

iff, and the plaintiffs herein were defendants, it was decided, June 23, 1910, that the former contracted to sell to the latter who agreed to buy from the former the corporate stock, business, and property of the B. A. Kipp Company, giving therefor the fair value October 1, 1909, a specified inventory to be regarded *prima facie* proof thereof; that *Mr. Kipp,* who had been in possession of the subject of the transaction from the date of the contract, administered the same as trustee for plaintiffs; that it was necessary to measure the amount they should pay by the fair value of the subject October 1, 1909, and also that defendant should account as trustee. The questions of value and accounting were referred to John A. Harper and *Mr. Kipp* was made receiver in the meantime; judgment to await confirmation of the report. In due course, a referee hearing was had; defendant offering in evidence only a statement of the financial condition of the B. A. Kipp Company, June 23, 1910—nothing definitely showing administration by him as trustee subsequent to the date of the sale. The statement was not represented as a trustee's account nor supposed by plaintiffs or their attorneys to be such, nor did they suppose it would be considered such by the referee. It appertained to the relations between defendant and the B. A. Kipp Company covering the period prior to October 1, 1909. Plaintiffs had no concern therewith, so waited for some disclosure of the transactions as trustee. They relied upon a report not being made without such a definite disclosure and opportunity to examine and contest it. The statement, viewed as a trustee disclosure, was grossly fraudulent, in that it omitted $20,000, more or less, which should have been charged defendant as trustee and credited on the purchase price of the property in closing the litigation by judgment. The account, in the particular form, was exhibited to deceive plaintiffs, their attorneys, and the referee. The latter was deceived thereby. Without citing defendant to account as trustee, the receiver reported "that *B. A. Kipp*

as receiver in this action, has made and filed his report, dated July 16, 1910, which report is filed herewith and marked Exhibit 6 and contains his accounts down to the 23d day of June, 1910, and there being no objection on the part of defendant to said report, the same is recommended for approval." Plaintiffs contested confirmation of such report upon the ground that there had not been any accounting as trustee. Defendant, however, by his counsel, fraudulently induced the circuit court to confirm the report and thereafter prevented said plaintiffs from procuring any relief therefrom in the supreme court by representing that the circuit court could correct any error in such report upon the settlement of the account as receiver. The circuit court, in fact, confirmed the report thinking that it did not include an accounting as trustee, and that the omission was without prejudice because the matter could be taken up, later, as part of the accounting as receiver. Judgment, however, was rendered, in form, so as to cover the trustee period, although such period was in fact ignored by the court. The judgment was for the entire purchase price of the subject of the sale, undiminished by any receipts therefrom by defendant during the trust period.

Plaintiffs made an unsuccessful effort in the circuit court and also in the supreme court to have the judgment corrected, so as to give them the benefit, by a credit upon the purchase price of the property, of what defendant realized therefrom during the trustee period, but were prevented by the attitude of defendant's counsel, inducing the belief that the judgment would not preclude plaintiffs from obtaining redress from their alleged grievance at the accounting as receiver. Subsequent to the trustee period, defendant received from the property $34,000, more or less, or more than the sum equitably due him.

Plaintiffs appealed from the judgment and it was affirmed without determining the amount due from defendant to

them. Thereafter they petitioned the circuit court for an accounting during the trustee period and application of any sum chargeable to defendant upon the judgment. The court decided that there was no authority to change the judgment, which had become that of the supreme court, and suggested relief for the wrong complained of should be sought in an independent action.

Later the accounting by defendant as receiver was, in due course, taken up, but his attorney refused to go into his transactions during the trustee period. Thereupon it was stipulated, in open court, that the account covering the receivership period might be approved without prejudice to the right of plaintiffs to an accounting for the trustee period and to inquire into the correctness of the accounts upon the books of the company, or otherwise, purporting to indicate the amount paid, or unpaid upon the judgment. The circuit court directed an order to be drafted accordingly and that before entry it should be submitted to plaintiffs' attorneys. Nevertheless, an order was prepared for judicial approval without the saving clause suggested and the judge was fraudulently induced to sign it. As soon as plaintiffs' attorneys were informed thereof they called attention of the circuit court thereto, whereupon the judge directed the order to be vacated and one to be entered according to the decision. He died before that could be done.

Defendant fraudulently claims there is still due him on the judgment some $17,000 "and fraudulently claims that he is not obliged to credit or apply upon said judgment the larger part, if not all, of said sums received and retained by him out of the assets and business of said B. A. Kipp Company" during the trustee period, "and fraudulently claims that said judgment" "together with said fraudulent order approving the account of said *B. A. Kipp* as receiver and discharging him, bars and prevents said plaintiffs from having any determination of the amount so received by him" during

the trustee period. He has caused an execution to be issued on the judgment on that theory to enforce payment of the aforesaid sum, when, in fact, there is nothing equitably due him. Plaintiffs have no adequate legal remedy to redress such wrong. The judgment, as it stands, appears of record to be a lien on real estate owned by plaintiffs at the time of its entry and thus clouds the title thereto, to their prejudice.

On such facts plaintiffs asked for an accounting by defendant respecting his dealings with the property during the trustee period, to have the amount he received therefrom since he was succeeded as receiver applied on the judgment sought to be enforced, or any sum equitably so applicable, and for defendant to be restrained from using such judgment to collect any sum in excess of the balance left after such accounting and application.

There was a demurrer, first, for want of jurisdiction of the defendant or of the subject of the action; second, because of another action pending between the parties covering the same subject matter; third, for insufficiency. The demurrer was sustained, first, because the allegations of fraud were too general; second, for want of diligence in discovering the matters complained of and of bringing them to the attention of the court in the first action; third, for want of jurisdiction to restrain in a second action enforcement of the judgment in the first on account of happenings subsequent to its entry.

For the appellants there was a brief by *N. L. Baker* and *W. J. Zimmers,* and oral argument by *Mr. Baker.*

*Paul D. Durant,* for the respondent.

MARSHALL, J. Appellants' story as related in the complaint, indicates that they have been the victims, to their loss in the sum of $20,000 more or less, of a systematic course of deception, practiced by respondent and his attorneys, of such subtle character as to impose upon the circuit and this court; securing and maintaining an unconscionable judgment.

The court below seems to have thought the complaint was barren of any statement warranting judicial relief from the judgment as originally inequitable, because of absence of specific allegations of fact respecting the acts constituting the alleged fraud, and because of absence of statements of fact showing, affirmatively, reasonable excuse for not discovering the fraud, if there were one, in time to have prevented respondent from prevailing, as he did, in the first action; and does not state any good ground for relief on account of circumstances occurring subsequent to the entry of judgment, since relief of that nature is only obtainable by proceedings in the court as well as the action where the judgment was rendered. Whether the complaint, in any event, states facts sufficient to warrant restraining respondent from enforcing his judgment, was not definitely passed upon below. That is probably the most important question in the case.

Whether the complaint sufficiently charges respondent with securing his judgment by fraud, must be determined by those liberal rules of pleading which have been so many times proclaimed in recent years, and not by the technical rules which the Code makers purposed abolishing.

As has often been said, in the beginning, particularly in *Morse v. Gilman,* 16 Wis. 504, the design of the framers of the Code to abolish all old forms of action and substitute for use in all cases the civil action, with a complaint containing in simple understandable language the plaintiff's story, leaving it for the court to say, regardless of what relief the pleader supposed himself to be entitled to and regardless of the action by any particular name, whether such story calls for any form of judicial relief within the competency of the court to afford, looking at such story, in all its parts, and in the whole, and taking all facts reasonably inferable from the specific allegations as well as those expressly stated,—was fully recognized and given its requisite vitality. But, later, for a time, that was somewhat lost sight of and the court came to test pleadings by something akin to the old rules.

During that period expressions were used in legal opinions indicating that, under all circumstances, an allegation that an act was fraudulently done should be classed as a mere legal conclusion rather than as tendering an issue of fact. It must be appreciated that the Code, as regards the sufficiency of pleadings, has been substantially restored. Technical accuracy in statements of fact is not required. Facts need not, necessarily, be expressly alleged. No very narrow idea is to be indulged in as to what is a legal conclusion and what a matter of fact, or mixed law and fact. Whether the pleader had the right conception of his cause of action according to common-law classification is immaterial. Whether he had the right conception of the relief the facts pleaded entitled him to, or the right relief is covered by the prayer, are likewise immaterial. All reasonable doubts are to be resolved in favor of the pleader. All facts expressly stated and all reasonably inferable therefrom, giving to the language of the pleading the broadest meaning which it will reasonably bear, are to be regarded as sufficiently alleged to meet any challenge for insufficiency. If, viewing the pleading with that large measure of liberality, it discloses a situation warranting any kind of judicial relief, it contains a good cause of action therefor, though very different from that which the pleader supposed himself entitled to.

In all that has been said in an endeavor to restore and entrench the Code beyond any possible danger of its not being permanently given its intended effect, the language of the court, spoken by DIXON, C. J., in *Morse v. Gilman,* 16 Wis. 504, has not been improved upon. It has been quoted again and again and not too often. More and more it should be appreciated so as to prevent any possibility of a complaint being condemned by the ancient rules for testing it. Note the language of the early phrasing of the rule of the Code:

"A complaint to be overthrown by a demurrer or objection to evidence, must be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute

a cause of action, or if a good cause of action can be gathered from it, it will stand, however inartificially these facts may be presented, or however defective, uncertain, or redundant may be the mode of their statement. Contrary to the common-law rule, every reasonable intendment and presumption is to be made in favor of the pleading, and it will not be set aside on demurrer unless it be so fatally defective that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever."

That was broadened, if possible, by the illustrations given of its effect.

It is notable that *Morse v. Gilman, supra,* so dropped out of sight that it is found cited but once, and that shortly after it was decided, on the particular subject matter, until *Miller v. Bayer,* 94 Wis. 123, 68 N. W. 869, which is the commencement of a series of some twenty-four citations, giving it the fullest practicable application. The following are but a few of the many illustrations: *Milwaukee T. Co. v. Van Valkenburgh,* 132 Wis. 638, 112 N. W. 1083; *State ex rel. Leiser v. Koch,* 138 Wis. 27, 34, 119 N. W. 839; *Emerson v. Nash,* 124 Wis. 369, 102 N. W. 921; *Bannen v. Kindling,* 142 Wis. 613, 617, 126 N. W. 5; *Hall v. Bell,* 143 Wis. 296, 299, 127 N. W. 967; *Bruheim v. Stratton,* 145 Wis. 271, 273, 129 N. W. 1092; *Schmidt v. Joint School Dist.* 146 Wis. 635, 639, 132 N. W. 583.

A few excerpts from the cases cited will emphasize the foregoing:

"The liberal rule, which to a very great extent promotes the administration of justice, doing away with the otherwise obstructive efficiency of technical unmeritorious and so unprejudicial defects, supplies in a pleading all essential matters not expressly stated when from the express statements they may reasonably be supposed to exist and to have been intended by the pleader to be included in such statements. . . . Reasonable doubts respecting the pleader's purpose as to matters which the adverse party is fairly entitled to have solved to enable him with due consideration to adopt

a course of action in respect thereto, must be presented to the court, for the purpose of obtaining enlightenment, by motion to make more definite and certain, not by challenging the pleading for insufficiency." *Milwaukee T. Co. v. Van Valkenburgh, supra.*

"The supreme test to be applied to a pleading as regards mere sufficiency is this: Will it reasonably admit of a construction which will sustain it, in the light of all facts alleged expressly or by reasonable inference, such inferable facts being regarded as alleged if their existence is reasonably suggested by the language used, and it being kept efficiently prominent in applying such test that reasonable doubts are to be resolved in favor of the pleading rather than against it where that can fairly be done?" *Milwaukee T. Co. v. Van Valkenburgh, supra.*

"If the facts stated, expressly and inferentially, upon any reasonable view, entitle respondent to any judicial relief in equity, . . . and regardless of mere indefiniteness of statement, it is sufficient on the challenge for insufficiency. . . . If this plain and valuable rule of the Code were always kept in mind by members of the profession much useless expenditure of time of courts and counsel, to the detriment of public and private interest, would be avoided." *Bannen v. Kindling,* 142 Wis. 613, 617, 126 N. W. 5.

"Matters of mixed law and fact, the ultimate of which is, in a broad sense, a fact, may be pleaded according to their legal effect. . . . Every fact necessary to entitle plaintiff to some judicial relief within the competency of the court to grant, which can reasonably be inferred from the language used, giving thereto, as a whole, the broadest meaning in favor of the pleading it will reasonably bear, must be considered as stated just as effectively as matters expressly and plainly alleged. In short, every reasonable intendment must be indulged in in favor of the pleading." *Schmidt v. Joint School Dist.* 146 Wis. 635, 639, 132 N. W. 583.

Thus it will be seen that the statements often met with in opinions that an allegation that an act was fraudulently done does not tender an issue of fact must be reconciled with the broad principle of the Code, by restricting it so as not to mis-

take matter of mixed law and fact, which may be pleaded as fact, nor mere indefiniteness for insufficiency, nor as involving a mere legal conclusion where the charge of fraudulently acting is made under such circumstances as to, necessarily or reasonably, raise an inference as to the nature of the act rendering it fraudulent. *McDonald v. Sullivan,* 135 Wis. 361, 116 N. W. 10, cited to our attention and relied upon by counsel, comes far short of supporting the idea that the term "fraudulent" or "fraudulently" under all circumstances involves a mere legal conclusion. There the court had under consideration a complaint depending upon a statutory remedy,—an act done with intent to defraud a prior or subsequent purchaser, under particular circumstances. It was held that a mere charge that the act was fraudulently done did not satisfy the statute for there was nothing in connection with use of the term to suggest that the party charged had the specific intent of the statute.

In *Crowley v. Hicks,* 98 Wis. 566, 74 N. W. 348, reliance was placed upon the text of Bliss on Code Pleading, § 211, *Cohn v. Goldman,* 76 N. Y. 286, and evident treatment of the term "fraudulently" under such circumstances as to render it a "meaningless epithet," not suggesting the existence of facts supporting it as a legal conclusion; moreover, not recognizing the very liberal rules which obtain under the Code. In the particular case, the term was referred to below as involving a "vague and unsatisfactory conclusion leaving it in uncertainty as to what his real purpose was." That is pregnant with the idea that, had the statement been made so as to indicate with reasonable clearness what the purpose of the pleader was, it would not, necessarily, have been regarded as a pure legal conclusion; moreover, it was somewhat overlooked that mere "vagueness and uncertainty" as to the purpose does not necessarily involve insufficiency, but is an infirmity to be reached by motion to make more definite and certain. In *Riley v. Riley,* 34 Wis. 372, it was held that

the charge of having "fraudulently taken advantage of the plaintiffs' incapacity" and thus "procured the challenged act to be done," "falsely and fraudulently representing said writing to be a mere matter of form, or will and testament," was insufficient for want of precision and a statement of the means whereby the false representations were successful. That case went a great way,—farther probably than could be regarded as consistent with the now firmly established test for the sufficiency of pleadings. That seems plain when it is seen that the allegations were condemned for want of "precision and point in their averment." As we have seen, "mere want of precision and point" in an averment does not go to sufficiency. Any mere indefiniteness and uncertainty may be reached by a motion to make more definite and certain. Now to require a definite, precise statement of the detail acts constituting the fraud would in some cases come pretty near to, if not more, require the pleading of evidence.

We must confess that there are expressions in opinions, particularly those of many years ago, tending to show that in charging fraud the specific acts relied upon as a basis for the charge should be definitely, expressly pleaded, but so far as they indicate an arbitrary universal rule, they must give way to the present state of the law as to liberality in construing pleadings and the competency to plead matter of mixed law and fact according to the legal effect,—whenever from the nature of the charge, its context, and the whole pleading, the underlying acts are, fairly or necessarily, inferable. That leaves the rule to stand so far as the substantial reason for it goes,—the right of the adverse party to know, reasonably, with what he is charged, and the competency of the court to pronounce the proper conclusion in case of the pleader's allegations being admitted,—but shorn of the technical requirement of definiteness which can readily be reached by a motion to make more definite and certain, or an examination under the statute to enable the adverse

party to plead. The statutory right in the latter field affords a party such ample facilities for obtaining particulars that to adhere to the doctrine of technical accuracy and fulness of statement which has support in some text-books and decisions of courts not working under as liberal system as ours, and perhaps in expressions in our own decisions, would afford ample opportunity to take advantage of a mere technical defect for the purpose of delay. Rarely does a person tender another an issue in court on the subject of whether that other has wronged such person, without first demanding redress without action, and under such circumstances as to acquaint such other with the precise nature of the claim. Therefore when the ground of action is set forth in somewhat general language, the defendant cannot well avoid knowing with reasonable certainty with what he is charged, and courts should so administer remedies as to prevent needless delay in bringing the controversy to the point of judicial investigation.

Facing the foregoing, is there that fatal want of precision in the complaint found by the trial court? True, there is the word "fraudulent" and the word "fraudulently," used several times but in connection with other language explanatory thereof and giving point thereto as matter of fact. "Said report and particularly the statement of liabilities of said company to said defendant *Kipp*," if understood as or intended to be any account of the acts and accounts of said *B. A. Kipp* as such trustee, or to determine in any manner the amount of such purchase price then unpaid, or the amount received by said defendant *B. A. Kipp* which should be applied and credited thereon,—"was and is grossly false and fraudulent;" "it fails to take into account and properly credit the greater part of said sum of $20,000 and more received by said defendant *B. A. Kipp* as aforesaid . . . and was offered in evidence, as plaintiffs are informed and believe, to deceive said referee and defraud said plaintiffs;" bristles, so to speak, with inferences of fact and is accom-

panied by allegations to the effect that the fraudulent intent was accomplished to appellants' damage in the sum of $20,000, more or less; and this: "said defendant *B. A. Kipp,* by his attorney, fraudulently induced said referee to make and file as one of his findings" a conclusion to the effect that the statement produced by respondent before the referee contained his accounts during the trustee period and that there being no objection thereto it was recommended for approval. Then there is the allegation that the referee's report was fraudulently presented to the court and it was fraudulently induced to confirm the same, in the face of appellants' protest that no accounting as trustee had occurred and demand for a re-reference and, to complete the history, the statement that, after the return of the cause from this court, in proceedings to settle *Mr. Kipp's* account as receiver, it was agreed that an order should be entered saving whatever rights appellants had to impeach defendant's accounts on the books of the B. A. Kipp Company, purporting to indicate the amount due him, and without prejudice to an accounting by him for the trustee period; and that the order should contain proper provisions in that regard and be approved by appellants' counsel before being signed by the court, but that, nevertheless, his attorney fraudulently procured an order to be entered without any such provision, which later the circuit court determined should be vacated and a proper order entered, but he died before that could be accomplished.

The lower court dealt with the features of the complaint mentioned without giving effect to the circumstances under which the words in question were used. For illustration: quoting from the circuit judge's opinion, "Plaintiffs allege that the report of the referee was false and fraudulent; that the defendant fraudulently induced the referee to make and file certain findings; that defendant by his counsel fraudulently procured and caused to be entered a judgment and an order, and that the defendant wrongfully and fraudulently

claims that a certain sum is due on the judgment." It is said that the particular words were used, all through, without specification of acts warranting the conclusion; whereas, as it seems to us, they are used in connection with expressly or inferentially stated circumstances forming fair ground therefor. To illustrate: note the circumstances under which the final order was obtained. The allegation that the referee's report was false and fraudulent occurred in connection with allegations to the effect that respondent, by his attorney, when called upon by the referee to account, presented a financial statement of the company, which, on its face, did not, specifically, show that it included the result of his handling of the property during the trustee period and which, in fact, omitted some $20,000 received by him out of the property; that it was so offered to deceive the referee into the belief that it contained a full statement of his handling of the property as trustee and to thus deceive appellants, and that the referee was thereby deceived and induced to make the prejudicially untrue finding. The allegation as to the entry of the judgment being fraudulently procured, occurs in connection with such a history of the transaction as to suggest, necessarily, that respondent, in the capacity of trustee, secured the entry of a judgment largely in excess of what it should have been, knowing that the court and referee had been deceived by his false and misleading statements into supposing that it contained a full disclosure of all his receipts as trustee, when, in fact, large sums, aggregating $20,000, more or less, had been omitted. The whole complaint shows an evident purpose to relate the story, and does it pretty clearly, of respondent having been trustee for appellants of the Kipp Company property for a considerable period; that when they called upon him to disclose how he had administered the same, he presented a statement, not in the form of a trustee account, but that of a corporation financial state-

ment and of such ambiguous character that it might be taken, and for the purpose of having it taken, as a trustee account, and that it was so taken to the knowledge of respondent, knowing that he had received some $20,000 not accounted for therein. The charge of having fraudulently induced the referee to make the false report and induced the court to approve of it, by necessary inference includes the charge that respondent falsely and with intent to cheat appellants, falsely expressly or impliedly represented the financial statement produced before the referee to show all his transactions as trustee and so represented the statement to the circuit court, or inferentially so represented, by failing to disclose its true character, when he knew of absence therefrom of any evidence of large sums of money with which he should be charged. The words "fraudulently induced the referee to make" the false finding and "fraudulently induced the circuit court to confirm" it, in connection with the whole story means what we have indicated and could not well be taken to mean anything else. So all the facts which the circuit court supposed to be absent were present, by express or implied statement and permissible pleading of facts according to their legal effect.

The court below quoted the essentials of such a cause of action as appellants were supposed to have attempted to state from *Stowell v. Eldred,* 26 Wis. 504, without observing the limitations and explanations in subsequent decisions which will be hereafter referred to. It would be well to tie closely to the later cases than to rely on this broad language of the early case:

"Chancery will relieve against a judgment at law on the ground of its being contrary to equity, when the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or when he was prevented from availing himself of the defense

by fraud or accident, or the acts of the opposite party unmixed with negligence or fault on his part."

Pointing to that rule the trial court found a fatal defect in the complaint, in that there was an absence of any statement of facts showing the requisite diligence to bring the matter complained of to the attention of the court and to show that they could have discovered the fraud in time to have availed themselves of its existence in the first action. On this branch of the case it seems to have been overlooked that respondent occupied a fiduciary relation to appellants. They had a right to rely upon his performing his duty prior to and upon the hearing before the referee. He had no right to remain silent and challenge the proof, much less was he justified in placing a delusive statement before the referee and pretending, either expressly or impliedly, that it contained an exhibit of his transactions during the trustee period. When the fiduciary position of respondent is considered and that appellants had used due care to employ attorneys whom they had reasonable ground to suppose were competent to protect their interests, the complaint shows such reasonable excuse for not presenting the matter complained of before the referee that a court of equity should not refuse to open its doors to prevent the success of a wicked scheme to cheat because of neglect at this point.

It was respondent who should have been the moving party as regards the accounting. Appellants had a right to suppose that he would exhibit a true statement of his trustee transactions; that the referee would see that he did it and that appellants' attorneys would keep an efficient oversight in respect to the matter. It may be that appellants' attorneys were too unsophisticated in the matter; even that they were negligent, or possibly incapable of coping with the particulars constituting the subtle deception said to have been practiced by respondent; but where a party uses ordinary care in the selection of attorneys to represent him in such

matters, equity may relieve him from the consequences of their infirmity or negligence. *Wis. M. & F. Ins. Co. Bank v. Mann,* 100 Wis. 596, 76 N. W. 777. It would be a strange weakness in our system of equity jurisdiction if a court could not or would not lend its aid to prevent a party from being greatly wronged by reason of his attorneys, either through negligence or otherwise, being imposed upon by the adverse party. So there was no fatal laches up to the time the referee's report was filed in the circuit court.

The trial court seems further to have overlooked the fact that, according to the complaint, confirmation of the referee's report was opposed upon the ground that respondent's pretended disclosure of his transactions during the trustee period did not make such disclosure at all; that only a misleading, deceptive statement was made with intent to deceive the referee and that, nevertheless, the report was confirmed and a re-reference refused because respondent's attorney persisted in urging upon the court the deceptive statement as containing a full disclosure of his trustee transactions, whereas his administration in that regard was wholly omitted, thereby keeping from the knowledge of the court the fact that he had received $20,000, more or less, and converted the same to his own use. The whole history of the case shows that the trial court was wrong in holding that there was delay in discovering the facts in time to make them available in the first case. The trouble was, according to the complaint, that the deception indulged in before the referee, was so persisted in, that the court, from first to last, was so imposed upon that appellants, with all the aid their attorneys afforded, were unable to avoid having the fraud of respondent in suppressing the real facts, prevail. This was not a case where appellants failed to discover the fraud until after the first case was closed to them, but one where it was believed and alleged to exist and there was such industry exercised to bring the matter efficiently to the attention of the

court as appellants were able to, relying upon their attorneys; but the latter, either through negligence or failure to comprehend the situation, failed to successfully cope with the deception of respondent.

So on this branch of the case the decision below was reached under a misconception of the effect of the history of the litigation detailed in the complaint. On the whole, giving the complaint the benefit of all reasonable inferences in appellants' favor, respondent designedly imposed upon the referee and the court until the first litigation was closed beyond opportunity for relief therein to the impoverishment of appellants and the enrichment of himself to the extent of some $20,000, more or less, received by him during the trustee period, which should have been applied upon the purchase price of the property before the final judgment was rendered; and, in addition, that he later received during the receivership period, succeeding his receivership large sums which should have been applied upon the judgment.

True, the last matter, standing alone, would not afford ground for an independent action; not because of any want of power of the court to so entertain the matter, but because the practice having become so firmly settled that relief in such circumstances should be sought in the first action, that it is regarded as jurisdictional error to permit a second action therefor, either in the same or any other court. *Jackson M. Co. v. Scott,* 130 Wis. 267, 110 N. W. 184; *Pleshek v. McDonell,* 130 Wis. 445, 110 N. W. 269. That being a mere matter of practice which has been given such dignity as to be regarded as jurisdictional, in the sense of inexcusable use of judicial power, as distinguished from want of power, it does not go to the extent of rendering it improper to entertain such a matter where it is connected with events happening before the close of the first action furnishing good ground for an independent action in equity to restrain plaintiff from enjoying the fruits of his unconscionable judgment.

In such a situation the court, having properly taken jurisdiction to deal with the proper major subject, may deal with the other matters as germane thereto and entertain the entire subject of dispute as to whether plaintiff should be restrained from enforcing his judgment.

There remains to be considered the question of whether a court of equity should exercise its jurisdiction in a case of this sort; one where it has once afforded the party complaining ample opportunity for redress and the time has gone by for any relief in the action instituted to that end, and where all the matters in controversy should have been forever set at rest.

There is no written law placing a limit upon the power of equity to remedy and redress wrongs, neither is there any want of power in that regard in the written law. It is the crowning merit of our system that, so far as power is concerned, it is as limitless as the capacity of man to wrong a fellow man. Courts may well proceed with great care in exercising their supreme authority outside of the field of ordinary judicial activity, but should never doubt or suggest want of power to deal with any situation where otherwise one person would be seriously injured by another in his person or property. The judicial arm of the people stands for its whole sovereign authority in that field, and so, in the very nature of things, must, in the final analysis, be limited only by the boundaries of justice and be taken as infallible as regards what is just under all the circumstances of any particular situation. Thus the maxim there is no wrong, above infractions of mere moral obligations, without a judicial remedy, is vindicated, even in a situation where wrong from one viewpoint has prevailed. Sound judicial policy requires that litigation shall have a course to a final determination. The end sought is peace with justice, and when courts have given, and litigants have had, the benefit of judicial instrumentalities throughout such a course, the finality, whether

right or wrong from a moral standpoint, should, in general, stand as an unimpeachable compact of peace between them and society. *Interest reipublicæ ut sit finis litium.* As also *Nemo debet bis vexari pro una et eadam causa.* Both maxims voice a policy firmly established in the law. Otherwise there would be no end to litigation, the mere mistakes, negligences, and falsehoods affecting the first result and persisting to the end of the course, would still leave the aggrieved party free to attack such result in a second action, and again in a third action,—action after action,—making litigation over a single controversy and its incidents, interminable. Obviously, that would be intolerable and courts have wrought out, as matter of unwritten law, the principle that, except in special circumstances of limited character where litigation has run its full ordinary course, there is, as matter of sound and necessary public policy, as forceful as any written law could be, that presumed infallibility in result which displaces the maxim "fraud vitiates everything" by estopping the party aggrieved from setting up fraud to avoid such result,—as it is said,—"closing the mouth on the one side and the ear on the other," creating a condition of lasting silence as to the matter closed by the judgment. Thus sometimes that may be right in law which is otherwise from a moral standpoint, since there is no wrong in legal contemplation as to that upon which the law's instrumentalities have set the seal of right. *Judicia sunt tanquam juris dicta, et pro veritate accipiuntur.*

So in the further consideration of this case we must deal with the question of jurisdiction of the court to afford relief, but only in the sense of whether, by the mandate of the unwritten law, it should be exercised to grant relief under the circumstances disclosed. The distinction between that want of power which is substantive, so to speak,—excess of it would be usurpation and the result void regardless of the dignity of the particular tribunal,—and want of jurisdiction

which is a mere going beyond the boundaries which sound judicial policy has set for the exercise of power but the result, nevertheless, in the finality, is as binding as any judicial determination can be and falls within the field of the quoted maxim. *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909; *Cline v. Whitaker,* 144 Wis. 439, 129 N. W. 400; *Will of Rice,* 150 Wis. 401, 136 N. W. 956, 137 N. W. 778.

At an early day in the history of jurisprudence in this country, the court of highest dignity formulated a rule to mark the general limitations beyond which judicial remedies should not be afforded to question a final judgment after having passed beyond the reach of attention in the action where rendered. *Marine Ins. Co. v. Hodgson,* 7 Cranch, 332. True, there was no attempt to state precise limitations. That was impossible because every court would be free to make exceptions to fit the necessities of particular situations. The dominant principle was all the court sought to proclaim. That was stated in these words by Chief Justice MARSHALL:

"Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

In my judgment courts in general have kept pretty well within the principle so early laid down. It has been expanded somewhat here and there, in applying it to new situations, but the real gist of it, I think, has remained to this day substantially free from infractions. While bowing to the decision of the court in *Boring v. Ott,* 138 Wis. 260, 119 N. W. 865, I may be permitted to point to the discussion of this subject in my opinion in that case. I could not well add in writing for the court to what is there said as to the general limitations. Sometimes by circumscribing one's vision by

the boundaries of a precedent and tying thereto for a solution of the controversy in hand because of similarity, or supposed similarity of facts, the real governing principle is lost sight of. By following that course as matter of practice, confusion is most certain to be created and the scope of judicial activity become so fenced about by precedents that jurisdiction is liable to turn thereon instead of on the legitimate final test. The crowning purpose of courts is to effect justice. Their jurisdiction must be likewise extensive and their paramount duty is to open their doors freely instead of reluctantly whenever, in an orderly way, appealed to, and the written law or sound public policy has not sealed them upon the theory that the public welfare at this point is of greater dignity than private right and requires it.

The sound public policy referred to must, necessarily, be somewhat elastic in order to be adaptable to special circumstances which may often present new conditions. There is the respect which must be given to principle over precedent. So it is said, "There is no vitality in precedents; there is in rules. They are susceptible of expansion along every line necessary to reach new conditions. In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice where legal remedies are infirm. Precedents will be a constant guide, but never a bar. Where a new condition exists, and legal remedies are inadequate or none are afforded at all, the never-failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, not adopting new ones, for that purpose." *McGowan v. Paul,* 141 Wis. 388, 396, 123 N. W. 253.

Recognizing the breadth of the judicial power as indicated, this court in *Stowell v. Eldred,* 26 Wis. 504, permitted an action to be maintained to prevent a party from enjoying the fruits of a judgment obtained by perjury. That, in my judgment, as maintained by me in *Boring v. Ott, supra,* was

contrary to precedents, old and new, though probably not outside of a broad conception of the principle. The court without referring to the initial case on the subject decided by the supreme court of the United States, thus formulated the rule for this state:

"Chancery will relieve against a judgment at law on the ground of its being contrary to equity, when the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or when he was prevented from availing himself of the defense by fraud or accident, or the acts of the opposite party unmixed with negligence or fault on his part."

As a precedent, *Stowell v. Eldred* justified *Boring v. Ott.* Evidently the court did not intend to announce a new principle,—at most only to state, broadly, an old one showing that the case in hand fell within it, and that was affirmed in *Boring v. Ott.* So it must be considered as settled in this state that fraud such as the commission of perjury in an action resulting in the wrongdoer obtaining a judgment, constitutes a wrong which, if the party aggrieved acts seasonably and was without inexcusable negligence in the action, equity will remedy. In that the court declined to follow, strictly, the doctrine of *U. S. v. Throckmorton,* 98 U. S. 61. There, for the first time, the precise nature of the fraud which will render a judgment open to attack in an independent action in equity was thus stated:

"The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

That was approved in *Uecker v. Thiedt,* 133 Wis. 148, 113 N. W. 447, and *Scheer v. Ulrich,* 133 Wis. 311, 113 N. W. 661. But such approval, so far as inconsistent with *Boring v. Ott,* must yield thereto. So it must be considered that

the broad rule as stated in *Stowell v. Eldred,* 26 Wis. 504, is the law of this forum, leaving administration thereof sufficiently elastic to meet the necessities of such serious situations as require a remedy and sufficiently restrictive as not to invade the wise public policy to, as generally as practicable, terminate litigation as to a single controversy. The precedents in our own court go only to the extent of holding that a judgment, secured by wilful perjury, may, under some circumstances, be relieved against in equity. But that must not be considered as establishing an exclusive situation as to where fraud intrinsic may be so dealt with. The real principle of the adjudications is that the power of equity to relieve against unconscionable judgments will not be strictly confined to such as are characterized by fraud extrinsic. Thus the rule of *Marine Ins. Co. v. Hodgson,* 7 Cranch, 332, is given a broad aspect, affording harmony with *Stowell v. Eldred, supra,* instead of following the restrictive exposition of the rule in *U. S. v. Throckmorton,* 98 U. S. 61.

So the vital question to be determined in such a case as this, is not, merely, whether the judgment was secured by fraud, extrinsic, without inexcusable fault of the aggrieved party, but was it secured by fraud without such fault, and are the circumstances so serious that the doors of equity ought not to open to afford relief?

Thus the early rule is not so closely fenced about by technical lines but that wise administration can enable the court to redress serious wrongs of the nature of that here complained of. Doubtless whether the facts require judicial interference, is largely matter of administration in a field where courts should exert their great power sparingly. In that respect, probably, fraud extrinsic would appeal successfully for such interference where fraud intrinsic would not, but the mere nature of the fraud in that regard would not be an arbitrary test.

Can there be any fair doubt that the facts of this case ap-

peal as strongly for a judicial remedy as one where a judgment is obtained by perjury? It is not a case where one may by mere silence permit a judgment to go in his favor, which is unjust. In ordinary situations one may, legally if not morally, keep silent and profit by his adversary's ignorance. That is neither fraud, intrinsic, as in case of perjury, nor fraud, extrinsic, within the *Throckmorton* rule. But where there is a solemn duty to speak, independently of coercion, and in judicial controversy as well, whether asked to speak or not, and there is a failure to speak, resulting in the enrichment of the wrongdoer and the impoverishment of the one to whom that duty is owing, there is a fraud of most serious nature and, in a sense, both intrinsic and extrinsic. That view was taken of the early rule and as a modification, if need be, of the *Throckmorton* exposition of it in *Maddox v. Apperson,* 14 Lea (82 Tenn.) 596. The court there said that if the term "extrinsic fraud" as distinguished from "intrinsic fraud" would bar relief where a judgment is obtained by suppressing evidence which the prevailing party is bound to disclose by reason of his relation to the adverse party, as in case of the existence of fiduciary relations, the court would not go that far.

Here the respondent, as before suggested, owed to appellants the active duty, independently of any litigation, to make a full disclosure of his transactions as trustee. That duty he owed, in a high degree, in the litigation, and also he owed the duty of making such disclosure to the court and to its referee. According to the complaint he not only failed in this respect, preventing thereby appellants from having the benefit thereof in the litigation, but palmed off on all parties a spurious deceptive paper as a disclosure and thus secured the judgment complained of. If those facts can be established, they will make a case fairly within the *Throckmorton* rule and the broader rule in *Marine Ins. Co. v. Hodgson.* Chief Justice MARSHALL there guarded the doctrine

proclaimed by prefacing with these words: "Without attempting to draw any precise line to which courts of equity will advance and which they cannot pass in restraining parties from availing themselves of judgments at law, it may be safely said," etc., using the language before quoted. This court, in the *Stowell Case,* asserted that principle, vindicating the wisdom of the early declination to "draw any precise line to which equity will advance and which the court cannot pass" in cases of this sort, and again vindicated it in *Boring v. Ott.*

From the broad lines of the rule, as approved in the latter case, who can place any precise limitations upon it? As we have seen, the effort elsewhere to confine it, strictly, to matters "extrinsic" this court has deliberately refused to follow, preferring the liberty to do justice, found within the broad lines of its early declaration. However, there is little doubt but that, if it were followed, it would include the situation in hand because of the particular relations of respondent to appellants. In any event, this court would rather be compelled to retrace its steps than to advance in order to hold that the situation here is up against a bar which it either cannot or will not pass in order to afford appellants an opportunity to obtain redress, if they are able to satisfactorily establish what they claim to be the facts. Obviously, they will find, in the end, this litigation to be useless to them, unless they can establish with more than mere reasonable certainty the facts upon which they rely,—prove them with that degree denominated "clear and satisfactory" which should be regarded with considerable emphasis in a case of this sort and up to the very border line, perhaps, of where no reasonable doubt remains.

*By the Court.*—The order appealed from is reversed, and the cause is remanded for further proceedings according to law.

TIMLIN, J. (*concurring*). I concur in the decision reversing the order of the circuit court, which order sustained a demurrer to the complaint, and my concurrence rests upon the following grounds:

In *Kipp v. Laun,* 146 Wis. 591, 131 N. W. 418, this court affirmed a judgment of the circuit court which among other things provided for a reference and an accounting in this litigation. In the complaint before us now it is sufficiently averred that the respondent in making such account as a fiduciary withheld and concealed evidence peculiarly within his knowledge relative to sums of money realized by him in the operation of the business and property purchased from him by *Laun et al.* and which he received while the litigation to enforce the contract was pending. That when this was brought to the attention of the circuit court, upon the hearing of a motion after judgment in said cause, it was shown to the circuit court that a further hearing in the cause and a further accounting would be necessary on account of such omitted items which would make a difference of about $20,000 in favor of the appellants. The circuit court, relying upon arguments of respondent's counsel to that effect, held it had no power in that action to modify that portion of the decree confirming the referee's report, but suggested an independent action by *Laun et al.* against *Kipp* for relief. Counsel for the respective parties litigant then stipulated in open court that the account of *Mr. Kipp* as receiver (he having been appointed receiver *ad interim*) might be allowed and the receiver discharged without in any manner approving said account upon the point hereinbefore mentioned and without prejudice to an accounting as to moneys received by said *Kipp* prior to his appointment as receiver, and directed that the order to be drawn should be submitted to counsel for *Laun et al.* and should contain a provision upon this subject satisfactory to them. The counsel for *Kipp* thereafter,

fraudulently and without submitting the same to the counsel for *Laun et al.*, presented to the court and had signed an order not containing any such reservation, and upon this coming to the knowledge of the circuit judge he declared that such order should be vacated and a proper order drawn pursuant to the former stipulation and direction. But the circuit judge died before this direction was carried into effect by proper judicial action. Upon such facts, coupled with proper averments to entitle appellants to an accounting, the complaint states a good cause of action within the rule of *U. S. v. Throckmorton,* 98 U. S. 61; *Marshall v. Holmes,* 141 U. S. 589, 12 Sup. Ct. 62; *Boring v. Ott,* 138 Wis. 260, 119 N. W. 865; *Uecker v. Thiedt,* 133 Wis. 148, 113 N. W. 447; and *Stowell v. Eldred,* 26 Wis. 504, either or all of them.

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LANDAUER, Respondent, vs. KASIK, Appellant.

*December 9, 1913—January 13, 1914.*

*Appeal: Harmless errors: Evidence: Admissions in pleadings: Tender of judgment: Special verdict: Form: Duplicity or indefiniteness in question.*

1. Where plaintiff's demand and his right to recover thereon were admitted by the answer, error in the admission of incompetent evidence to establish them was entirely immaterial and nonprejudicial.
2. In an action to recover a balance of $2,414.28 alleged to be due upon the sale of goods of the value of $2,721.40, defendant answered admitting the sale but alleging that the goods were worth only $2,716.49 (which would leave a balance of $2,409.37 on the sale). In a counterclaim for $2,396.92, he admitted that he owed plaintiff "the balance between $2,409.37 and $2,396.92, or the sum of $12.95," and tendered judgment therefor. *Held,* that the admission in the answer was sufficient to warrant judgment for plaintiff thereon, and that the admission in the counterclaim was both a tender of judgment and an admission of the amount due.

3. In a counterclaim defendant alleged that he worked for plaintiff for a year at a salary of $4,000, of which a part remained unpaid. There was evidence tending to show that defendant was to receive that salary, but plaintiff's evidence tended to show that the salary was to be $4,000 only in case the commissions on sales made by defendant amounted to that sum, which they did not. Unless defendant was to receive a salary of $4,000 independent of commissions, he showed no right to recover. As to a question in the special verdict, "Was the agreement between the parties . . . for a straight salary of $4,000, not dependent upon a commission?" the court charged that if the jury were satisfied that the parties agreed that "defendant should receive a straight salary of $4,000, not dependent upon the amount of goods to be sold by him, that is, upon a commission," the question should be answered Yes, otherwise it must be answered No. *Held*, that in the light of the evidence and the charge a negative answer by the jury was a sufficiently definite finding and negatived the right of the defendant to recover on his counterclaim.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

*William E. Burke,* for the appellant.

*Frank M. Hoyt,* for the respondent.

TIMLIN, J. The complaint was for goods, wares, and merchandise of the reasonable value of $2,721.40 sold and delivered by plaintiff to defendant on and between April 4 and June 13, 1911, upon which there was paid $307.12, leaving due $2,414.28. The answer admitted "that between said dates plaintiff sold and delivered to the defendant certain goods, wares, and merchandise as alleged in his complaint, but defendant alleges in that behalf that the correct reasonable value of such goods, wares, and merchandise was the sum of $2,716.49." A counterclaim was then set forth by which the defendant averred a contract in writing with the plaintiff, "wherein and whereby said plaintiff employed this defendant to work for him for a period of one year from said 1st day of October, 1910, at and for the agreed salary of $4,000 per year, to be payable in equal in-

stalments of $333.33 per month." It was further averred that defendant continued in the employment of the plaintiff for one year and received $1,903.08, leaving due him $2,096.92, and that defendant also paid $300 to the use of the plaintiff, and counterclaims for $2,396.92. Defendant avers: "This defendant admits owing to the plaintiff the balance between $2,409.37 and $2,396.92, or the sum of $12.95," for which he offers judgment. The written contracts were lost. The evidence on the part of the defendant relating to this counterclaim tended to show that the contract of employment was for a salary of $4,000, together with a commission of five per cent. on sales in excess of $50,000, defendant to pay his own expenses. But the sales fell far short of $50,000. The evidence on the part of the plaintiff tended to show that the contract of employment in question was solely upon a commission of eight per cent. of the amount of sales made by defendant, the plaintiff to advance $333.33 per month and charge the same against defendant's commissions. There was another version of the contract which some disconnected admissions of the parties tended to support, namely, that there was a contract for $4,000 salary to be measured by commissions, that is to say, the defendant should have $4,000 salary provided his sales amounted to $50,000, out of which salary he must pay his traveling expenses.

There being no question about plaintiff's right to recover on the pleadings, the issues on the counterclaim were, without objection from either counsel, submitted on a special verdict framed and answered as follows:

"(1) Was the agreement between the parties made on or about October 1, 1910, for a straight salary of $4,000, not dependent upon a commission? *A.* No.

"(2) Was the contract between the parties terminated on or before June 1, 1911? *A.* No.

"(3) Was a settlement made between the parties as to any contract for services on or about June 1, 1911? *A.* No."

The court instructed the jury relative to the first question of the verdict as follows:

"If you are satisfied to a reasonable certainty by a fair preponderance of the evidence that the plaintiff and defendant agreed on or about October 1, 1910, that for the following year the defendant should receive a straight salary of $4,000, not dependent upon the amount of goods to be sold by him, that is, upon a commission, then you will answer this question 'Yes;' otherwise you must answer it 'No.'"

It seems best to treat the cause of action set forth in the complaint and that set forth in the counterclaim separately.

Oral evidence was erroneously admitted to prove the plaintiff's bankruptcy, and thereafter a copy of an order of the federal court, not certified according to the state law or to the act of Congress, was erroneously admitted to prove a composition with creditors and the revesting in plaintiff of his property, including the chose in action sued on. These two errors were entirely immaterial and nonprejudicial. The plaintiff's demand and his right to recover thereon were admitted by the pleadings, and, rejecting either or both the matters attempted to be established by this incompetent evidence, the court was still bound to give judgment for the plaintiff on his demand so long as the pleadings authorized no other disposition of the case. These rulings furnish a very good illustration of a class of nonprejudicial errors.

It is argued that the admission in the answer is not sufficient to bring about this result and that the admission in the counterclaim is an offer of judgment. But we cannot agree with either position. We consider the admission in the answer sufficient to warrant judgment for the plaintiff thereon, and the admission in the counterclaim to perform the double office of a tender of judgment and an admission of the amount due.

With reference to the counterclaim, it is contended by appellant that the court erred in refusing to grant his motion

for allowance of the counterclaim, and in the alternative in denying his motion for a new trial, the latter on the ground that the first question with its answer is double, indefinite, and uncertain, and may be construed to mean either that the agreement between the parties was dependent upon commissions or that it was for a straight salary without commissions. No objection was made below to the form of verdict and it must therefore be considered to have been satisfactory to both parties. The verdict further must be taken to be in response to the pleadings and evidence and in support of the judgment if it will reasonably bear that construction. The learned circuit judge evidently had in mind the difference between a salary of $4,000 dependent upon commissions reaching that sum and a straight salary of $4,000 independent of commissions. The latter was the salary claimed by defendant in his counterclaim. If he had no agreement for a salary of $4,000 independent of or not dependent upon commissions, he showed no right to recover. It was not an improper description of the demand set forth in the counterclaim to term it "a salary of $4,000 not dependent upon commission." We think the answer to this question negatived the right of the defendant to recover on his counterclaim, and, interpreted by the evidence and as explained by the charge, the finding is sufficiently definite. With this negation of the contract claimed by defendant and no evidence of damages by loss of commissions or of profits over expenses or otherwise, the counterclaim was effectually disposed of. There was nothing to submit to the jury in the way of damages, and the answers to the second and third questions became immaterial.

*By the Court.*—Judgment affirmed.

GLANDER, Administratrix, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

*December 9, 1913—January 13, 1914.*

*Electricity: Broken wire: Death of person: Contributory negligence.*

**Where a broken or detached guy wire, charged with electricity, was hanging near a pole, swaying and emitting flame or sparks when it came in contact with the pole, a city fireman who had been stationed there and told to keep away and keep others away from the pole and wire, because it was dangerous, was, as a matter of law, guilty of contributory negligence when, in an uncalled-for attempt to break down the wire, he grasped it with his bare hand and received a shock which killed him.**

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Plaintiff brings this action to recover damages for the death of her husband, who was a fireman of the city of Milwaukee. Death resulted from grasping a guy wire charged with electricity. The wire in question had become broken or detached, and hung suspended about eighteen inches distant from a wooden pole. It reached within five or six feet of the ground. The wire in swaying back and forth from the wind periodically touched the pole. The contact resulted in the emission of sparks from the wire which burned a small hole in the pole. The fire department was called by telephone and responded to the call. In the meantime the fire had been put out by boys throwing snow on it. After the department arrived the wire continued to sway and to emit a flame or sparks when it came in contact with the pole.

Captain Konz, who was acting as assistant chief on this occasion, was the first member of the fire department to arrive. He testified that he got there about three minutes after he received the call. Lieutenant Murphy and his men arrived a few seconds later. The deceased was a member of

this crew. Captain Konz further testified that he told Lieutenant Murphy to see that no one went near the post and that he would telephone the operator of the fire department to notify the street railway company to send a line wagon to make the necessary repair and to shut off the current. After telephoning, he advised the firemen to return to the stations, after directing Lieutenant Murphy to leave a detail of men to stay near the post to see that no one came in contact with it. He also said that he advised the firemen to keep away from the pole, and that he was advised by Murphy that he would leave the deceased to warn persons to keep away, and that he also told him to keep away from the pole. He also testified that he told his men to keep away from the wire and not to let any one come within five or six feet of the pole. Later he said that he was not sure that he specifically mentioned the wire, but that if any one kept away from the pole he would also keep away from the wire.

Lieutenant Murphy testified that the wire was electrified and that every time it touched the pole it would spit fire. Also that he detailed the deceased to stay there and guard the wire and not let anybody come in contact with it, and that he told him to stay until some one came and removed the wire and in the meantime to keep people away from it.

The witness Halazon was called by the plaintiff, and he testified that he was on the ground when the firemen came; that they (meaning either the captain or lieutenant or both) told deceased to keep people away from the pole, because it was dangerous for any one to go near it, and that the wire was still sparking when the department left and continued to spark after that.

There is practically no dispute as to what occurred thereafter. After waiting for about fifteen or twenty minutes the deceased took hold of the wire with his right hand, on which he was wearing a leather glove, and apparently backed

toward the sidewalk, in the meantime trying to break the wire down. The wire was of the size of a slate pencil and he was not successful. He then moved forward and grasped the wire with his left hand, which was bare, and received a shock which killed him almost instantaneously. The witness Killian testified that a woman living in the neighborhood told deceased not to touch the wire.

The evening was mild, the deceased had had his supper, and he was detailed to remain where he was stationed until the repair wagon came along. No reason is suggested why he did not obey the instructions he had received or why he undertook to break a wire of the size of this one. There was no insulation on it whatever.

The following questions were propounded to the jury, to which they returned answers as indicated:

"(1) Did the defendant in placing the feed wire as it did on the pole at the corner of Eighth street and St. Paul avenue, fail to exercise ordinary care? *A.* Yes.

"(2) If you answer question number 1 'Yes,' then answer: Was such failure to exercise ordinary care in so placing the feed wire a proximate cause of Glander's injury? *A.* Yes.

"(3) Did the defendant fail to exercise ordinary care by not shutting off the circuit after notified by telephone of a crossed wire and before Glander was killed? *A.* Yes.

"(4) If you answer question number 3 'Yes,' was such failure to shut off the circuit a proximate cause of Glander's injury? *A.* Yes.

"(5) When left in charge of the post and wire was Glander warned by one of his superiors that the wire might be charged with electric current capable of producing injury to the person? *A.* No.

"(6) Would a person of ordinary care in the situation of Glander have learned before touching the wire that it was charged with electric current capable of producing injury to the person? *A.* No.

"(7) If you answer the foregoing question 'Yes,' ought

Glander in the exercise of ordinary care to have known at the time he took hold of the wire that such dangerous situation still existed? *A.* ——.

"(8) Did any want of ordinary care on the part of Glander proximately contribute to his injury? *A.* No.

"(9) What sum will compensate the plaintiff for the pecuniary loss she has sustained? *A.* $2,750."

The court changed the three negative answers to "Yes," and answered question 7 in the affirmative, and on the verdict as changed rendered judgment for defendant.

The trial judge in disposing of the case said in reference to the deceased, among other things:

"His duty was to keep everybody away from the wire, not the wire from everybody. If the wire was a danger to *everybody,* it was a danger to him, and he was clearly stepping outside of the line of his duty in undertaking to do that which he was directed to wait for some one else to do."

For the appellant there were briefs by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Walmsley.*

For the respondent there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *J. D. Shaw.*

BARNES, J. The essential facts are embodied in the foregoing statement. It would almost seem that it was obviously dangerous to the deceased, a man nearly twenty-six years of age who had passed a civil service examination, to take hold of this bare wire with his bare hand under the circumstances which were known to him. It was constantly throwing out significant danger signals. Be this as it may, he was warned to keep away and to keep others away from the pole and wire, because it was dangerous to come near them. Counsel argue that the captain's warning related to the pole and not to the wire. This we think is far fetched. The lieutenant's instructions were specific and his evidence is not disputed. Deceased could not keep a respectful distance from

the pole without keeping away from the wire also. The case is unfortunate and distressing, but the evidence of contributory negligence is clear; at least as clear as it was in *Billington v. Eastern Wis. R. & L. Co.* 137 Wis. 416, 119 N. W. 127.

*By the Court.*—Judgment affirmed.

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R. G. UHLMANN FUR COMPANY, Respondent, vs. GATES and another, Executors, Appellants.

*December 9, 1913—January 13, 1914*

*Abatement and revival: Death of party: Appealable orders: Abuse of discretion.*

1. An order reviving an action against the personal representatives of a deceased party is appealable.
2. Such an order, being in a matter within the sound discretion of the trial court, will not be disturbed unless that discretion was abused.
3. In an action commenced in June, 1906, for the purchase price of women's furs, defendant alleged that he never ordered or accepted them, that if they were furnished to his wife it was without his knowledge or consent, that they were not necessaries, and that he was not liable therefor. A few days later he brought suit for a divorce on the ground of desertion, and a divorce was granted in December, 1908. The action against him was noticed for trial in October, 1906; in June, 1907, it was by stipulation continued over the current term; and thereafter nothing was done by either party to bring it to trial. In August, 1911, defendant died suddenly. In April, 1913, after a motion to dismiss for want of prosecution had been made, plaintiff moved to revive the action. It being apparent that the defense practically died with the defendant, it is *held* that it was an abuse of discretion, under all the circumstances, to revive the action.

APPEAL from orders of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action was commenced June 21, 1906. The complaint contained two counts, one for goods sold and delivered to the defendant prior to December 1, 1905, of the value of $920, which it is alleged the defendant on that day agreed to pay, and the other for work and labor performed for the defendant between November, 1905, and March, 1906, of the value of $17.50. The goods alleged to have been sold were furs, suitable for women's wear. July 10, 1906, the defendant answered alleging, among other things, "that he never ordered or accepted the goods, wares, and merchandise mentioned in the complaint, and never authorized the ordering or acceptance of said goods on his behalf by any person whatever, and further alleging that the plaintiff never performed the work, labor, and services referred to in the complaint, or any other work, labor, or services whatever, for this defendant, either at the times as specified in said complaint, or at any other time." The answer also contained a general denial, and defendant claimed that these goods, if furnished to any one, were furnished to his wife without his knowledge or consent. He further claimed that his wife was fully supplied with all necessary articles of wearing apparel and was not authorized to pledge his credit, and when he saw these furs he understood from his wife that the same were purchased prior to her marriage to him, which occurred August 26, 1905.

On June 25, 1906, divorce proceedings were instituted by the defendant against his wife on the ground of desertion, and the parties were divorced December 12, 1908.

This case was regularly noticed, and placed upon the calendar, for trial at the October, 1906, term. On June 3, 1907, the parties signed a stipulation continuing the case for the then current term of court. Each claims that such stipulation was entered into at the request of the other. Since said stipulation was signed nothing further was done by either party to bring the case to trial. On August 25, 1911, the defendant, who had for many years past resided in Mil-

waukee, Wisconsin, suddenly died after an illness of only a couple of days. Letters testamentary upon the estate of defendant were on September 29, 1911, issued to Julius Jungblut and Robert L. Gates, and on January 12, 1912, and January 29, 1912, the plaintiff filed its claims involved in this action in the county court of Milwaukee county against the estate of defendant. On February 20, 1913, an order was entered, based on the affidavit of Robert L. Gates, requiring the plaintiff to show cause March 1, 1913, why this action should not be dismissed for want of prosecution and for failure to revive the same after the death of the defendant. The plaintiff filed an affidavit in opposition to the motion, and additional affidavits were permitted by the court to be filed by the defendant. On July 15, 1913, the court entered an order denying the motion to dismiss the action and, at the same time, granted an order based on all of the affidavits and supplemental complaint and all the records, files, and proceedings in the action, reviving the case against the executors. The executors appealed from both of these orders.

For the appellants there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *F. L. McNamara.*

For the respondent there was a brief by *Chauncey W. Yockey,* attorney, and *Waldron, Carrigan, Connelly & Dineen,* of counsel, and oral argument by *Frank Waldron* and *C. R. Dineen.*

VINJE, J. That the order of revival is appealable was held in *Voss v. Stoll,* 141 Wis. 267, 124 N. W. 89. That the application to revive was addressed to the sound discretion of the trial court, and that this court will not interfere with its action thereon unless there has been an abuse of discretion, is the settled law of this state. *Harris v. Welch,* 148 Wis. 441, 447, 134 N. W. 1041.

Plaintiff claims it had a right to refrain from prosecuting the action during the pendency of the divorce suit. Conced-

ing, but not admitting, such right, it appears that the divorce was granted December 12, 1908. The defendant did not die till August 25, 1911, and the motion to revive was not made until April 8, 1913, after a motion to dismiss for want of prosecution had been made. The delay from December 12, 1908, until the death of the defendant remains wholly unexplained. It is apparent from the issues in the case that the defendant alone was in a position to make any defense to the claims made by the complaint, and that, practically, the defense died with him. Under such circumstances, and in view of the facts in the case, it was an abuse of discretion to revive the action. The decision in *Allen v. Frawley,* 138 Wis. 295, 119 N. W. 565, rules this case.

*By the Court.*—Orders appealed from reversed, and cause remanded with directions to grant the motion to dismiss.

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STATE EX REL. WILCZEWSKI, Appellant, vs. COMMON COUNCIL OF THE CITY OF MILWAUKEE, Respondent.

*December 9, 1913—January 13, 1914.*

*Intoxicating liquors: Revocation of license: Proceedings before common council: Defects, when disregarded: Amendments: Hearing in committee of the whole: Evidence: Record.*

1. In proceedings before a city council to revoke a liquor license defects or imperfections in mere matters of form, at any stage of the proceedings, having no tendency to prejudice the defendant are to be disregarded; and where the person and the case may rightly be understood by the tribunal, amendments may be ordered curing such defects.
2. The hearing in such a proceeding may be had before the council sitting in committee of the whole, the final action being taken by the council in regular session.
3. The evidence taken in such a proceeding need not be made matter of record, it being sufficient that the resolution embodying the action of the council recites that evidence was taken and proof submitted.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

In an action of *certiorari* brought to reverse the action of the *Common Council of Milwaukee* in revoking the relator's saloon license, the revocation was affirmed and the relator appeals. It appeared by the return that the original complaint in the proceedings to revoke the license was made by a police officer of Milwaukee, and charged that

"*Frank Wilczewski,* who is licensed by the city of Milwaukee to sell strong, ardent, spirituous, and malt liquors, subject to the laws of the State of Wisconsin and regulations of the *Common Council of the City of Milwaukee,* at 722 Seventh avenue, Eighth ward, in said city, which license is at the present time in force and effect, on or about the 3d day of February, 1913, was arrested for selling liquor to minors in the place above mentioned, namely, to John Palowski, aged nineteen years, and on February 17, 1913, the case against *Frank Wilczewski* was nolled, as it was shown that he was not in the saloon at the time the young man was there; that his wife, Anna Wilczewski, was in charge of the place and served the drinks; thereupon the city attorney issued a warrant against Anna Wilczewski, charging her with selling liquors to the minor, John Palowski, aged nineteen years, to which a plea of *nolle contendere* was entered on the 17th day of January, 1913, and she was fined twenty-five ($25) dollars and costs; that said sale was made without the written order of the parents or guardian of said John Palowski."

It further appeared that a summons was issued on this complaint, that the relator appeared before the *Council* in obedience thereto and objected to the sufficiency of the complaint, whereupon an amended complaint was permitted to be filed in which it was alleged that

"*Frank Wilczewski,* who was duly licensed by the city of Milwaukee to sell strong, ardent, spirituous, and malt liquors, subject to the laws of the State of Wisconsin and regulations of the *Common Council of Milwaukee,* at 722 Seventh avenue, Eighth ward, in said city, which license is at the present

time in force and effect, did, on the 31st day of January, 1913, sell intoxicating liquors, to wit, wine, to a minor, namely, John Palowski, age nineteen years, at his place above named, without the written consent of parents or guardians of said John Palowski."

Thereupon the *Council* resolved itself into a committee of the whole, and after hearing the evidence reported to the *Council* for passage a resolution to the effect that the complaint was found to be true and that the license was revoked, which resolution was adopted by the *Council.*

The cause was submitted for the appellant on the brief of *Gilbertson, Lehr, Reitman & Kiefer,* attorneys, and *J. Elmer Lehr,* of counsel, and for the respondent on that of *Daniel W. Hoan,* city attorney, and *Eugene L. McIntyre,* special assistant city attorney.

WINSLOW, C. J. This court, after full consideration of the subject, held in *State ex rel. McKay v. Curtis,* 130 Wis. 357, 110 N. W. 189, that in such proceedings as the present defects or imperfections in mere matters of form at any stage of the proceedings having no tendency to prejudice the defendant are to be disregarded, and that where the person and the case may rightly be understood by the tribunal amendments may be ordered curing such defects.

Applying this rule to the present case, it is plain that the revocation of the license was properly ordered.

The first complaint filed before the *Council* was inartificially drawn, but it stated the fact under oath that there had been a conviction of the person in charge of the relator's saloon for unlawfully selling liquor to a minor, and that revocation of the relator's license was desired. Probably this was sufficient under sec. 1558, Stats., but in any event the amendment curing the defect was entirely proper under the principles above stated, because there is no doubt but that "the person and the case" must have been rightly understood by the tribunal.

The claim that the hearing could not be rightly had before the committee of the whole must be rejected. The difference between a legislative or an administrative body sitting in committee of the whole and in regular session is a difference rather in name than in nature. The whole body is present in both cases. For convenience in matters calling for deliberation, debate, or consultation the body resolves itself into the committee of the whole, but when these purposes have been accomplished and definite legislative or administrative action is to be taken, it resumes its sittings as a legislative or administrative body and takes such action. That is what was done in the present case and no sound reason occurs to us why it should be even criticised. The relator has had his hearing before the proper body in either case, and the final action was taken by the *Council* in regular session.

The objection that the return does not show what testimony was taken cannot prevail. The resolution recites that evidence was taken and proof submitted, and the statute does not require that the evidence shall be made matter of record.

*By the Court.*—Judgment affirmed.

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CITY OF MILWAUKEE, Appellant, vs. RUPLINGER, Respondent.

*December 9, 1913—January 13, 1914.*

*Municipal ordinances: Validity: Penalty for act made a misdemeanor by statute: Keeping unlicensed junk shop: "Fine" collectible in civil action: Appeal by city: Licenses: Delegation of legislative power to mayor.*

1. Although a statute makes an act a misdemeanor, a municipal ordinance enacted under proper legislative authority may also make it punishable by a fine or penalty collectible in a civil action.

2. So *held* as to the keeping of a junk shop without license, made a misdemeanor by ch. 337, Laws of 1887, and also made punishable by fine by an ordinance of the city of Milwaukee enacted pursuant to its charter (sec. 3, subch. IV, ch. 184, Laws of 1874, as amended by ch. 74, Laws of 1891).
3. The term "fine" or "punished by fine" in a city ordinance implies a mere forfeiture or penalty collectible by civil action in the name of the city; and in such action the city has the right to appeal from the result of the trial.
4. A city ordinance providing for the licensing of junk shops and that all applications for licenses thereunder "shall be made to the mayor, who may grant or refuse to grant such license as to him may seem best for the good order of the city," was not invalid as a delegation of legislative or arbitrary power. It conferred upon the mayor administrative duties only, to be exercised in a reasonable and impartial manner, and gave him no authority to say whether the business of keeping junk shops should be permitted or not, or to discriminate between persons under the same or similar circumstances. *Little Chute v. Van Camp*, 136 Wis. 526, distinguished.

APPEAL from a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Reversed.*

Prosecution for violating a municipal ordinance regulating the business of junk dealers.

The cause was commenced in the district court by filing of a complaint and issuance of a warrant, as in a civil action for the recovery of a penalty. In due course, the accused was found not guilty by the verdict of a jury. The city of *Milwaukee,* still dealing with the matter as a civil action, appealed to the municipal court where, in due course, the action was dismissed because the offense charged, as thought, was a misdemeanor and so the city had no right to appeal from a judgment of acquittal.

For the appellant there were briefs by *Daniel W. Hoan,* city attorney, and *Arthur H. Bartelt,* assistant city attorney, and oral argument by *Mr. Bartelt.*

For the respondent there were briefs by *Austin, Fehr & Gehrz,* and oral argument by *G. G. Gehrz.*

MARSHALL, J. The charter of the city of *Milwaukee,* at the time of the enactment of the ordinance under which the action was commenced, by sec. 3, subch. IV, ch. 184, Laws of 1874, as amended by ch. 74, Laws of 1891, provided that the common council of said city shall "have authority—anything in any general law of this state to the contrary notwithstanding—by ordinances, resolutions, by-laws, rules or regulations" "to tax, license, control and regulate . . . all keepers or proprietors of . . . junk shops . . . and to fix and regulate the amount of license . . . and to prescribe the time for which such licenses shall be granted, and to provide and enforce penalties for carrying on" said business. There existed ch. 337, Laws of 1887, providing that the mayor of the city of *Milwaukee* may, in circumstances mentioned, grant licenses for carrying on the business of keeping junk shops and prohibiting any one from carrying on such business "without being duly licensed, under penalty of fifty dollars fine for each and every day he or she shall exercise or carry on said business without such license," and further providing that "every person violating any of the provisions of this act shall be punished by a fine not exceeding one hundred dollars, nor less than ten dollars, or by imprisonment in the house of correction of Milwaukee county for a term not exceeding six months, or by both such fine and imprisonment." The later act did not refer to the earlier one. It is not likely that the legislature intended by the act of 1887 to take away from the city the power it then had to regulate by ordinance the business of keeping junk shops and to enforce the regulation by penalties; but, if it did, such power was restored by the act of 1891.

Pursuant to the latter act the common council of the city of *Milwaukee,* prior to the occurrence giving rise to the prosecution, duly ordained by ch. XXVII of the City Ordinances of 1906 that "No person or persons shall . . . within the city of *Milwaukee* . . . keep a junk shop . . .

without being first thereunto duly licensed as herein provided."

The prosecution here was for a violation of that ordinance. The court below seems to have thought that, since the state statute applicable to *Milwaukee* made the keeping of a junk shop without a license a misdemeanor, the prosecution was, really, thereunder, notwithstanding it was, in form, for violation of the city ordinance. It evidently was supposed that the ordinance was inconsistent with the state statutes, making the keeping of such a shop in the city of *Milwaukee* a misdemeanor, and therefore it did not apply as the common council could not repeal the statute. The answer is that, as we have indicated, if the legislature by the act of 1887 purposed taking from the common council of the city of *Milwaukee* the power to regulate the junk-shop business by ordinance, it, later, restored that power. It further seems to have been thought below, that the act of 1887 was a state statute covering the subject of keeping junk shops and making the keeping of such in violation thereof a misdemeanor, and, therefore, the city, notwithstanding its broad powers, as before indicated, could not regulate such business by ordinance; that if the keeping of such a shop without a license was a misdemeanor under the act of 1887, it cannot be, at the same time, a *quasi*-criminal offense under the ordinance, penalized by a fine collectible by civil action. That is ruled otherwise by *State ex rel. Milwaukee v. Newman,* 96 Wis. 258, 71 N. W. 438. It was there said:

"It seems to be the clear weight of authority that an act may be a penal offense under the laws of the state, and that further penalties, under proper legislative authority, may be imposed for its commission by municipal by-laws or ordinances, and the enforcement of the one would not preclude the enforcement of the other."

That was followed in *Ogden v. Madison,* 111 Wis. 413, 422, 87 N. W. 568, and *State v. Hamley,* 137 Wis. 458, 119

N. W. 114. That is to say, an act may constitute a double offense; it may violate a statute making it a misdemeanor and it may violate a municipal regulation making it a *quasi*-criminal offense.

It may have been thought that, because the ordinance uses the term "punished by fine," the council did more, or attempted to do more than to merely provide that a violator should suffer a penalty collectible by civil action, as in ordinary cases; that he should be punished as guilty of a crime. That is ruled to the contrary by *Oshkosh v. Schwartz,* 55 Wis. 483, 13 N. W. 552; *Ogden v. Madison, supra,* and other cases. The mere term "fine" or "punished by fine" in a penal statute does not necessarily imply a misdemeanor. It is otherwise as to the terms "fine and imprisonment" and "fine or imprisonment." The former term in a city ordinance implies a mere forfeiture or penalty collectible by civil action in the name of the city, in which case the city has the right of appeal from the result of a trial by express statute, and as indicated in *Milwaukee v. Beatty,* 149 Wis. 349, 135 N. W. 873.

The foregoing covers all matters decided by the court below; but it is suggested that the ordinance is void because the counsel attempted thereby to practically abdicate its power to license persons to conduct the junk business by transferring the whole discretionary power in respect to the matter to the mayor, affording him authority to grant or refuse a license to any person, regardless of the facts.

True, the language of the ordinance is quite general in that it provides that "all applications for license under this ordinance shall be made to the mayor, who may grant or refuse to grant such license as to him may seem best for the good order of the city." Manifestly, if by any fair construction of that language all that was left to the mayor was the exercise of mere administrative functions in a reasonable manner, then counsel's point is not well taken. There is no

principle better established than that a law may be made, complete in itself, and be left to some officer or tribunal to determine the facts requisite to application of the enactment to a given case.

Now it seems that the ordinance in question easily admits of a construction conferring on the mayor administrative duties, only, to be exercised in an impartial manner. The language must be construed in connection with the whole ordinance of which it forms a part. The scheme was to make the keeping of a junk shop, without first obtaining a license, an offense against a city regulation, punishable by a penalty as provided expressly in the city charter. The only thing left for the mayor to do was to pass upon candidates for municipal favor. The amount of the license fee, when the time shall begin, and when it shall end, and all the details are expressly provided for. Necessarily, application for the license has to be made to some one and some one has to supervise its issuance. Those are matters of administration. Necessarily, also, if the city desires to discriminate as to the character of the persons whom it will permit to operate junk shops within its limits, that is matter of administration. Evidently, for the purpose of such discrimination and that only, it was provided that applications for licenses shall be to the mayor, "who may grant or refuse to grant such license as to him may seem best for the good order of the city."

The ordinance dealt with the keeping of junk shops as a legitimate business. Therefore it is not to be thought that there was any purpose to clothe the mayor with power to permit or suppress such business. The idea embodied in the ordinance, by reasonable, if not necessary inference, is that any suitable person, considering all things bearing on the question, for the operation of the junk business, shall, if he desires, upon compliance with the ordinance, have a license to run such business. Manifestly, the question of suitability

must depend upon the existence or non-existence of facts and the facts must vary somewhat according to character, temperament, age, history, and many other things. The idea that the purpose of the ordinance was to confer upon the mayor power to act arbitrarily so as to suppress the business of keeping junk shops instead of regulating it, or to pass favorably upon one candidate for a license and unfavorably upon another under the same or similar circumstances, or to do otherwise than, having the "good order of the city" as the objective, pass reasonably upon the suitability of a candidate for license, within the field of that discretion which is administrative as distinguished from legislative, and acts upon judgment as distinguished from acting upon mere whim, prejudice, or caprice, is repellent to the whole scheme embodied in the ordinance and must be rejected.

This case differs widely, on its facts, from *Little Chute v. Van Camp,* 136 Wis. 526, 117 N. W. 1012. The distinction was there recognized between that administrative power which has to do with executing law and the legislative authority which has to do with making law. Authority to determine, arbitrarily, whether a saloon shall be closed or not was said to be legislative and discriminatory. Here authority was not conferred on the mayor to say whether the business of keeping junk shops should be permitted or not, and if permitted, to discriminate between persons under the same or similar circumstances. The licensing of such business was provided for, as before indicated, in all its details, leaving only to the judgment of the mayor as regards suitability of candidates.

It is not always clear as to whether a power is legitimately conferred because administrative or illegitimately bestowed because legislative. Therefore precedents are of little use in determining classification. They are useful in illustrating the principle here involved, but it is too elementary to

require illustrating. In testing an enactment by such principle, all reasonable doubts must be resolved in favor of the legislative body having conferred administrative power only.

It follows from the foregoing that the judgment must be reversed and cause remanded for further proceedings according to law.

*By the Court.*—So ordered.

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STATE EX REL. BLOOMER, Respondent, vs. CANAVAN and others, Appellants.

*December 10, 1913—January 13, 1914.*

*Municipal corporations: Commission form of government: Statutes construed: Abolishment of existing boards: Restoration: Vacancies in office: Appointments: Delay: Term of office:* De facto *officers: Removal of policeman: Constitutional law: Option laws: Partial invalidity: Classification of cities: Qualifications for office: Exclusion of saloonkeepers.*

1. Under ch. 448, Laws of 1909, providing for the governing of cities by commissions, and declaring that upon the reorganization of a city under that act the council of three should "have all the powers and perform the duties had and exercised by the mayor and council and the several administrative and executive officers, boards and commissions of such city," the effect of the adoption of the act by a city was to put an end to an existing fire and police commission.
2. Ch. 387, Laws of 1911, which amended said act of 1909 so as to provide for the continued existence of boards and commissions created under laws theretofore in force in any city which should adopt the commission form of government, had the effect to create or restore a fire and police commission which had previously been abolished in such city, but not to reinstate in office the former members of such commission.
3. The act of 1911 provided for the selection of one member of such board, in cities already organized under the commission form of government, by the city council from their own number at

their first regular meeting after the act was passed, and it was the evident intent that the board should be organized and proceed to carry out its functions promptly after such act of 1911 was passed.

4. Practically, in such a case, there were vacancies in the board to be filled as soon as the act of 1911 became effective, and as to the members other than the one to be chosen from the council the mayor had power to fill such vacancies, under sec. 959—40, Stats., which, not being inconsistent with the new scheme of government under the act of 1911, was continued in force by virtue of sec. 925*m*—303.

5. The fact that the mayor and council did not act promptly in such case in naming the members of such board, did not invalidate their acts when done at a later period.

6. Even if the terms for which members of such fire and police board were appointed were not legal, yet, the authority existing to make the appointments for as long a time as they were made, the appointees accepting and acting as such were at least *de facto* officers, and their action in trying charges against and removing a policeman was valid.

7. Even if said acts of 1909 and 1911 were unconstitutional there would still be a *de jure* office under the previously existing statute, and the former incumbents having ceased to act, the new appointees would be *de facto* officers just the same, with the power of removal.

8. The provision of ch. 448, Laws of 1909, allowing the electors of a city to determine by vote whether the city should elect to come under the law, is valid.

9. The further provision by which a city at the end of six years might, by vote of its electors, abandon the commission form of government and go back to its old charter, was evidently not a determining factor with the legislature, and, whether valid or not, does not affect the validity of the remainder of the act.

10. The fact that cities of the first class are excluded from its operation does not render the act unconstitutional. The existing classification of cities having been approved as valid, the power to legislate for one or more of the classes is quite plenary, although no reason can be advanced why the legislation should be confined to the class or classes included.

11. The city officers provided for under the commission form of government are not constitutional officers, and a statute which prescribes a certificate of good moral character from a certain number of electors as a qualification for candidacy for such offices, does not offend against the constitution.

12. The provision of ch. 448, Laws of 1909, excluding saloonkeepers from the office of mayor or councilman, violates no constitutional right, since those officers have to do with the granting of licenses for the sale of liquor, the making of ordinances and regulations relative to the liquor traffic, and the enforcement of state laws in reference thereto—matters which might conflict with the interests of saloonkeepers.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Reversed.*

*Henry D. Ryan,* for the appellants.

For the respondent there was a brief by *J. Elmer Lehr,* attorney, and *Horace B. Walmsley* and *Gilbertson, Lehr, Reitman & Kiefer,* of counsel, and oral argument by *Mr. Walmsley.*

BARNES, J. Acting under ch. 448, Laws of 1909, the city of Appleton adopted the commission form of government. The reorganization was perfected on April 19, 1911. Ch. 448, Laws of 1909, was amended by ch. 387, Laws of 1911, which act became effective on June 19, 1911. On December 20, 1911, the chief of police suspended the relator, a police patrolman, for drunkenness and other misconduct and reported such action to the mayor. On January 3, 1912, the mayor appointed four persons as members of the board of police and fire commissioners of the city to serve until the first Monday in May following, which appointments were confirmed. The council selected the mayor to act as a fifth member of the commission. These appointees took the necessary steps to qualify. On January 15, 1912, the relator demanded an immediate hearing on the charges preferred against him. Such hearing was held on January 20th before the commission constituted as indicated, the relator appearing in person and by counsel and offering such evidence as he desired to submit. The commissioners found that the charges were sustained and removed the relator, who

thereupon sued out a writ of *certiorari* to review the action of the board in making the removal.

In the petition for the writ it was set forth that the board was without power, jurisdiction, or authority to act in the matter and that its action was a nullity because the board of police and fire commissioners in office prior to April 19, 1911, continued in office thereafter, and such board was the only lawful one in existence on January 20, 1912. The term of office of but one member of the old board had expired at this time unless the entire board had been legislated out of office by reason of the change to the commission form of government. It was also alleged in the petition for the writ that ch. 448, Laws of 1909, and ch. 387, Laws of 1911, were violative of several provisions of our constitution and therefore void, and that the members of the so-called board were neither *de facto* nor *de jure* officers and their act in removing the relator was a nullity.

On the part of the defendants and appellants it is urged (1) that the old board of police and fire commissioners ceased to exist for all purposes when the reorganization was effected on April 19; (2) that it was the duty of the mayor to appoint four members of a new board by virtue of ch. 387, Laws of 1911, and of the council to select one of their number to constitute a fifth member of such board; (3) that in any event the persons who acted on the board when the relator was removed were *de facto* officers and their acts were therefore valid; (4) that the acts of the board were legalized by ch. 488, Laws of 1913; and (5) that the laws of 1909 and 1911 referred to are constitutional and valid.

The circuit court held (1) that the acts in question were constitutional; (2) that the old board continued in office after the reorganization; and (3) that, whether it did or not, the mayor had no authority to appoint new members of the board at the time when he did, and that the proceedings of the board in so far as they affected the relator were void.

In support of the judgment the respondent urges in this court that the board which removed the relator was an unlawful body; that the members of the board were not *de facto* officers; and that the statutes of 1909 and 1911 are void (a) because they attempt to delegate legislative power, (b) because the classification of cities attempted to be made is not a legitimate one, (c) because the acts prescribe unconstitutional qualifications for officers, and (d) because they arbitrarily exclude certain citizens from the privilege of holding office altogether.

1. Sec. 959—40, Stats. (Laws of 1909, ch. 181), provides for a board of police and fire commissioners in all cities of the second and third classes and for the manner in which the commissioners shall be appointed, and the succeeding sections define the rights, powers, and duties of such board. Its powers over the police and fire departments are broad.

Ch. 448, Laws of 1909, provided a radically different scheme for the government of our cities from that found in our general charter law or in our special charters. The new scheme comprehended the wiping out of most of the existing offices and of placing the full power to govern and run the affairs of a city in the hands of three men. They might employ such help as they needed, but the responsibility for the city government was placed on their shoulders. If their administration was successful the credit belonged to them, and if it was not there was no chance to shift the blame, because there was no divided responsibility. This legislative idea is quite apparent from the whole act and finds definite expression in sub. 1, sec. 925*m*—308, Stats. (Laws of 1909, ch. 448), which reads:

"A city so reorganized shall be governed by its council, consisting of the mayor and councilmen elected as hereinbefore provided, *and such council shall have all the powers and perform the duties had and exercised by the mayor and coun-*

*cil and the several administrative and executive officers, boards, and commissions of such city,* whether its former organization existed under general or special law."

By virtue of this provision all of the powers and duties formerly exercised by the board of police and fire commissioners of the city of Appleton were taken away and transferred to the new council. There was no further duty or function which the old board could perform. This being so, we think it was clearly the intention of the legislature that it should be wiped out. As a positive or even a negative force in the government of the city it was neither useful nor ornamental, and we do not think it was contemplated that it should be carried along as a useless appendage. The statute cited was inconsistent with sec. 959—40, Stats. (Laws of 1909, ch. 181), and succeeding sections, and therefore the existing board was not saved or continued in office by sub. 1 of sec. 925*m*—303, being part of ch. 448, Laws of 1909. Assuming for the present that the law of 1909 was valid, we think the old fire and police board ceased to exist on and after April 19, 1911.

The 1911 legislature proceeded to engraft some of the old system of city government on the new. It repealed sec. 925*m*—308 in its entirety, and enacted a new section in its stead. By the amendment all the powers and duties conferred on the mayor and common council of a city were, in case of a change, conferred and imposed on the mayor and councilmen of the new organization. However, it was provided by the new act that:

"All boards and commissions created and existing under laws heretofore in force in any city shall continue to exist, and all powers, authority, jurisdiction and duties conferred and imposed upon such boards and commissions shall remain unaffected by this act, except that the mayor shall not be *ex officio* a member of any such board or commission." [Sub. 5, sec. 925—308, ch. 387, Laws of 1911.]

The effect of this act in the instant case was to create a fire and police board in the city of Appleton, which board should have all the powers and perform all the duties conferred or imposed by the charter of the city prior to the adoption of the commission form of government. This amendment became effective two months after the reorganization and did not serve to reinstate in office those who had been legislated out by reason of the adoption of ch. 448, Laws of 1909.

By sec. 959—40, Stats., which became applicable to the city of Appleton by virtue of the 1911 amendment, the mayor was required to appoint annually between the last Monday in April and the first Monday in May one member of the board of fire and police commissioners for the term of five years or until his successor was appointed and qualified. It is insisted that the mayor had no lawful authority to appoint four members of the board when he did nor for the time for which they were appointed.

As to the member of the board who was to be selected by the mayor and council from their membership, the statutes, sub. 6 of sec. 925—308, required such cities as were already organized under the commission form of government to make the selection at the first regular meeting of the council held after the act was passed and published. It is evident from this that the legislature intended that the board of police and fire commissioners should be organized and proceed to carry out its functions promptly after the act of 1911 was passed.

The board was created by the law as to cities already having a commission government, but there were no officers to act until they were named. For all practical purposes, there were vacancies to be filled as soon as the act became effective. Sec. 959—40 provided that vacancies in such board should be filled by the mayor. As before stated, the section became part of the charter of the city when it was enacted. It was part of the charter before the commission form of govern-

ment was adopted, because it was one common to all cities, and pursuant to its provisions a board of fire and police commissioners had been appointed. By sec. 925*m*—303 it was provided that any law applicable to the city before its reorganization, and not inconsistent with said ch. 448, was continued in force.

The only default of the mayor was in not promptly naming the commissioners he was authorized to appoint after the passage of the act. The only default of the councilmen was in not naming one of their number more promptly to act on such commission. This temporary failure of duty in no way invalidated these acts when they were done. *State ex rel. Elliott v. Kelly,* 154 Wis. 482, 143 N. W. 153. There may be some doubt as to whether the terms specified in the appointments were legal, but it is wholly immaterial whether they were or not. The authority existed to make the appointments for as long a time as they were made, and clearly the appointees were *de facto* officers. It follows from what has been said that the commission who tried the relator were at least *de facto* officers and probably *de jure* officers as well, if the law providing for a commission government for cities is constitutional. There is nothing to show that the old board ever assumed to act or perform any functions after April 19, 1911.

If it should be admitted that the acts of 1909 and 1911 referred to were unconstitutional and void and that the members of the old board never were legally ousted from office, we do not see how the concession could help the respondent's case. It is conceded that the office was established by a perfectly valid statute, ch. 247, Laws of 1897 (sec. 959—40 *et seq.*). If ch. 448, Laws of 1909, was void, it did not operate to repeal said ch. 247 and there was no need of reenacting that chapter in 1911. So it is clear that there was a *de jure* office. There is no claim that the old officers continued to act after April 19, 1911, or that they did not ac-

cept the situation and assume that their offices then became vacant. When the respondent demanded his hearing the appellants were in possession of the offices and assuming to act as officers and to perform the functions of the offices. The respondent submitted his case to them for decision. There would seem to be little doubt that the appellants were *de facto* officers under the authorities, and that as such they had the power of removal. *State ex rel. Elliott v. Kelly,* 154 Wis. 482, 143 N. W. 153; *State ex rel. Kleinsteuber v. Kotecki, ante,* p. 66, 144 N. W. 200; *State ex rel. Jones v. Oates,* 86 Wis. 634, 57 N. W. 296; *State v. Bloom,* 17 Wis. 521; *Chicago & N. W. R. Co. v. Langlade Co.* 56 Wis. 614, 627, 14 N. W. 844; *Strange v. Oconto L. Co.* 136 Wis. 516, 117 N. W. 1023.

2. We do not intend to cast any doubt upon the constitutionality of the acts of 1909 and 1911 by anything that has been said. The questions raised do not appear to be very serious.

The right of the electors to determine by vote whether a city should elect to come under the law no longer presents an open question in this state since the decision in *State ex rel. Van Alstine v. Frear,* 142 Wis. 320, 125 N. W. 961.

3. The provision by which a city at the end of six years may by vote of its electors abandon the commission form of government and go back to its old charter is more doubtful, but if this part of the act should be held invalid when the question is presented in a proper case, we do not think that the entire act would fall with it. It seems perfectly obvious that the legislature would have enacted the rest of the statute had it been aware that this particular part of it was invalid. It was an option law which cities might adopt or not as they saw fit. It was conceived with the idea that it afforded a more efficient method for city government than the system in vogue. The proviso has nothing to do with the new system of government. It may be that cities acting under the

belief that they could go back to their first love after the expiration of six years might be more willing to try the experiment than they would be if no such right existed, but we fail to see how this consideration could have affected the legislature. It has the right at any time to wipe out the new system if it proves to be a failure.

4. Neither do we think the law obnoxious to the constitution because it does not apply to cities of the first class. The classification of cities made by the general charter law has been sustained in numerous cases. So have acts which legislated for one or more of the classes so named. The classification having been made, it is held that the power of the legislature to legislate for one or more of the classes is quite plenary, although no reason can be advanced why the legislation should be confined to the class or classes covered. Ch. 575, Laws of 1911, furnishes a good example of such a law, and it was sustained by this court in *Wis. Cent. R. Co. v. Superior,* 152 Wis. 464, 469, 140 N. W. 79.

5. The most vigorous attack in the oral argument at the bar was made on the provision which requires a candidate for the nomination to office at the primary election to secure the signature of twenty-five resident electors to a statement that the signers know the prospective candidate "to be a man of good moral character." It was argued that a man may make a capable and even an excellent officer and still have an unsavory moral character. A number of individuals who were conspicuous in public life in the past were named by way of illustration, and some of them did not live in the remote past either. In this connection it was argued that a man of bad moral character has a constitutional right to run for office which the legislature cannot take away, and that courts have been too prone to ignore the right of the individual and to sustain acts of doubtful validity out of deference to the legislative branch of the government.

The provision of the constitution offended against is said

to be sec. 3 of art. XIII. This section prohibits certain classes therein named from holding office, and the argument is that all who are not included in these classes have the right to hold any office to which they can be elected, regardless of qualification. When we consider the ease with which petitions that do not call for the payment of money will attract signers, it is quite obvious that the requirement of the statute and the requirement of good moral character in fact are, from a practical point of view, essentially different things. However, treating them as being synonymous, we could hardly adopt respondent's construction of the constitutional provision in question. We apprehend that if the legislature should provide that no person should be elected president of the university or of a normal school in this state unless he knew the multiplication table, it might do so. As a matter of fact, qualifications are prescribed for many if not most of the persons who are to fill offices recently created, and of course they can be where the office is not a constitutional one in reference to which the constitution prescribes the qualifications. *State ex rel. Tesch v. Von Baumbach,* 12 Wis. 310; *Fordyce v. State ex rel. Kelleher,* 115 Wis. 608, 614, 92 N. W. 430; *State ex rel. Buell v. Frear,* 146 Wis. 291, 299, 131 N. W. 832. The officers here involved are not constitutional officers, and if the legislature had prescribed good moral character as a qualification, we think it would be acting within its rights.

6. The provision of the act excluding saloonkeepers from the office of mayor or councilman must be sustained on a different basis if it is sustained at all. The business of retailing liquor is licensed and is lawful and those who engage in it are not outlaws so long as they obey the laws. We think their exclusion can be justified on another ground, however. The mayor and councilmen determine who are fit and who are not fit persons to license. They make ordinances and regulations regulating the liquor traffic and are charged to a

certain extent with the enforcement of the state laws in reference thereto. No doubt the legislative thought was that if one or more retail liquor dealers were placed upon the governing body of the city, their private interests might conflict with their duty to the public, and this is a legitimate reason for the disqualification. Undoubtedly this was the motive which actuated the legislature in amending sec. 959—40 so as to exclude licensed saloonkeepers from the board of fire and police commissioners.

*By the Court.*—The judgment appealed from is reversed, and the cause is remanded with directions to enter judgment in accordance with the opinion.

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MURRAY, Appellant, vs. PAINE LUMBER COMPANY, Respondent.

*December 10, 1913—January 13, 1914.*

*Trial: Special verdict: Answer construed in light of instructions: Conflicting findings: Presumption on appeal: Master and servant: Injury: Assumption of risk: Unsafe scaffold: Change made in progress of work.*

1. The effect of an answer in a special verdict must be determined in the light of the instructions given in connection with the question, and it may be broader than the mere wording of the question would imply.
2. Assumption of risk and absence of contributory negligence may co-exist.
3. An affirmative answer to a question, "Did the plaintiff voluntarily use the platform in its changed condition?" after a finding that he took part in making the change in question, did not in terms constitute a finding upon the issue of plaintiff's assumption of the risk; but where the court in connection with such question instructed the jury that a servant voluntarily using a dangerous structure or machine with knowledge of its condition assumes the risk, it would, if standing alone upon that issue, constitute such a finding.
4. Where, however, the court by its instructions in connection with a question upon the issue of contributory negligence, sub-

mitted under that question the issue of whether or not plaintiff assumed the risk, and the jury returned a negative answer, such answers were conflicting and would warrant judgment for neither party.

5. Defendant having requested the submission of a question clearly presenting the issue of assumption of risk, which was refused, no finding upon that issue in defendant's favor can be presumed under sec. 2858*m*, Stats., unless it can be held as a matter of law that plaintiff did assume the risk.
6. In an action for personal injuries alleged to have been caused by a defective scaffold or platform upon which plaintiff was working, the defense of assumption of risk is available to the defendant.
7. The facts that plaintiff assisted other workmen in changing one joist in a scaffold and that he heard another employee advise the person nailing it to put in more spikes, to which the latter replied that it was strong enough, were not sufficient to charge plaintiff with assumption of the risk as a matter of law.
8. Where such change was necessary to allow the performance of work with which the timbers of the original scaffold interfered, and was made in the presence and with the consent of defendant's foreman, the statutory duty to furnish a safe scaffold applied to the structure as changed.
9. Such single alteration in the scaffold did not render applicable the rule relative to a place of work which is constantly changing during the progress of the work.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action for a personal injury. The defendant, *Paine Lumber Company,* desired to replace an old wooden veneer vat, about forty-three feet long east and west, sixteen feet wide, and eight feet deep, with a concrete one. In order to do so it became necessary to remove the dirt and rubbish in, and floor of, the old vat as well as the side walls. For the purpose of facilitating the work of removing the dirt, rubbish, and floor, a scaffold about four feet in height from the bottom of the vat, and about six feet wide and ten or twelve feet long east and west, was built near the south side of the vat extending to within a few feet of the west end thereof.

It was supported by 2 x 6 joists, which were nailed at the south end to some old piles and at the north end to new 6 x 6 upright timbers standing upon the bottom of the vat near its middle. The dirt and rubbish was shoveled on to the scaffold and from there out of the vat and removed. When the crew, of which plaintiff formed a part, came to remove the floor planks of the vat they found that the joist of the scaffold at the east end hindered them in handling the planks, so they put in a new joist, nailing it at the south end to one of the old piles and at the north end to one of the upright timbers in the middle of the vat located further east than the one to which the original joist was nailed. The effect of this was to extend the scaffold somewhat to the east, and boards were laid over the old scaffold and the new joist, and the original east joist was then removed. The jury found that the plaintiff assisted in making this change. There was evidence to show that while the new joist was being spiked to the pile plaintiff held it, and that one Erdman said, in plaintiff's hearing, "You fellows ought to put in a few more spikes, for it would not hold," and that someone said in reply that it would hold all right. While plaintiff and another were upon the scaffold assisting in removing planks three inches in thickness, twelve to fourteen inches wide, and twelve to fourteen feet long, which had formed the floor of the old vat and which were water-soaked and weighed about 250 pounds each, the northeast corner of the scaffold gave way and plaintiff was precipitated to the bottom and injured. The testimony tends to show that the spikes of the new joist driven into the old pile at the south end pulled out, causing the scaffold to fall. The evidence as to the exact location, dimensions, and construction of the scaffold is contradictory and confusing, but the facts above stated seem to be fairly established by the evidence. The plaintiff and his witnesses denied that there was any change made in, or extension to, the old scaffold, or that plaintiff assisted therein.

By special verdict the jury found as follows:

"(1) Was the plaintiff injured at the time and place alleged in the complaint by the fall of said scaffold? *A.* (by the court). Yes.

"(2) Was said injury caused by any want of ordinary care and prudence on the part of the defendant? *A.* Yes.

"(3) If you answer the above question 'Yes,' then was such want of ordinary care and prudence on the part of the defendant the proximate cause of said accident and injury? *A.* Yes.

"(4) Was the said platform or scaffold as originally furnished and erected by the defendant in said vat so erected, placed, and constructed by it in a safe, suitable, and proper manner and so as to give proper protection to the life and limb of persons using the same? *A.* No.

"(5) If you answer the above question 'No,' then was such want of safety and suitableness the proximate cause of the accident and plaintiff's injury? *A.* Yes.

"(5½) Was said platform altered and changed shortly before the accident? *A.* Yes.

"(6) Did the plaintiff, *Murray,* assist and take part in altering and changing the said platform or scaffold shortly before the said accident? *A.* Yes.

"(7) If you answer question No. 6 'Yes,' then was such change in the construction of the platform the proximate cause of said accident? *A.* Yes.

"(8) If you answer either of questions 6 or 7 'Yes,' then did the plaintiff voluntarily use the platform in its changed condition? *A.* Yes.

"(9) Did any want of ordinary care and prudence on the part of the plaintiff contribute to the injury? *A.* No.

"(10) If the plaintiff is entitled to recover at what sum do you assess his damages? *A.* $1,000."

The court entered judgment upon the special verdict of the jury dismissing plaintiff's complaint and cause of action on the merits. From such judgment the plaintiff appealed.

For the appellant there were briefs by *Gill & Barry,* attorneys, and *M. H. Eaton,* of counsel, and oral argument by *Mr. Eaton.*

For the respondent there was a brief by *Thompson, Thompson & Jackson,* attorneys, and *Charles Barber,* of counsel, and oral argument by *Mr. Carl D. Jackson* and *Mr. Barber.*

VINJE, J. After the rendition of the verdict plaintiff moved the court to change each of the answers to questions 5½, 6, and 7 from Yes to No, and that the plaintiff have judgment upon the verdict as amended by the court, or, in case the court refused to change the said answers or any of them, that the plaintiff have judgment upon the verdict as rendered. The court refused each and every one of plaintiff's motions, and upon motion of the defendant entered judgment in its favor. Whether the trial court in so doing was of the opinion that by its answer to question No. 8 the jury found that plaintiff assumed the risk, or whether the court was of the opinion that the question of plaintiff's assumption of risk was not passed upon by the jury and it found relative thereto in favor of the defendant, does not appear from the record. Question No. 8 does not in terms constitute a finding upon the issue of plaintiff's assumption of risk. The instructions relative thereto, however, given by the court are broad enough to include such issue. The court said:

"If an employee knows that a structure or machine is unsafe and dangerous he has the right to refuse to use it. If he does use it, with such knowledge, he assumes the risk. Now, did the plaintiff go on this platform and use it voluntarily, or was he compelled to go there by order of some superior officer? That is for you to determine from all the evidence and answer either Yes or No. The words 'voluntarily used' mean using the scaffold with full knowledge of a change of condition."

The jury returned an affirmative answer to the eighth question, and if that stood alone in the special verdict upon the issue of plaintiff's assumption of risk it would, taken in

connection with the above instruction, constitute a finding to the effect that plaintiff assumed the risk. But the court in submitting the ninth question, which was, "Did any want of ordinary care and prudence on the part of the plaintiff contribute to the injury?" instructed the jury as follows:

"An employee is bound to take notice of such dangers as are open and obvious, and are equally open to his observation as to that of his employer. If he is of mature age and ordinary intelligence, he is presumed to know the dangers which by the exercise of ordinary care and prudence he might have ascertained. *As to all such he assumes the risk.* But he does not assume the risk of such dangers as are hidden and concealed and known to the employer but not known to him. *Now, was the manner of the construction of this platform known to the plaintiff?*"

This instruction also submits under this question the issue of whether or not the plaintiff assumed the risk, and the jury answered the question in the negative. It is therefore impossible to tell whether the jury found in favor of or against the plaintiff upon this issue. That there may be an assumption of risk and absence of contributory negligence is well settled. *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633; *Dodge v. Kaufman,* 152 Wis. 171, 139 N. W. 741; *Van Dinter v. Worden-Allen Co.* 153 Wis. 533, 138 N. W. 1016, 142 N. W. 122. And had the instructions under question 9 related solely to contributory negligence there would have been no conflict in answers to questions 8 and 9. But the effect of an answer must be determined in the light of the instructions given in connection with the question, and it may be broader than the mere wording of the question itself would imply. *Panoff v. C., M. & St. P. R. Co., ante,* p. 99, 143 N. W. 1070. So the difficulty here is that, taken in connection with the instructions given, the answers to questions 8 and 9 are conflicting. The better practice would have been to submit a specific question as to whether or not plaintiff assumed the risk. Such question

was in substance requested by the defendant to be given. It asked for the submission of this question: "Ought the plaintiff, *Murray,* in the exercise of ordinary care, to have known of the danger, if any, of using the platform on which he was injured, as it was used in the condition it was in at the time of the accident?" In the margin of the record, opposite this question, in pencil, is the notation "embraced in con. negligence," said to have been made by the trial judge. It is apparent, however, that in rendering judgment for the defendant the trial judge did not consider that the question of plaintiff's assumption of risk was included in the question of contributory negligence, for the jury answered that question in the negative. Such answer, unchanged, together with the other answers of the special verdict, exclusive of the answer to question No. 8, entitled the plaintiff to judgment. If the answer to question 8 was considered the court could give judgment to neither party, for since the defendant requested the question relative to the issue of plaintiff's assumption of risk to be submitted to the jury, and it was not submitted, the court could make no finding thereon in its favor, unless it could be held as a matter of law that plaintiff assumed the risk. Sec. 2858*m,* Stats. 1911. That the defense of the assumption of risk was available to the defendant in this case is held in *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179; *Kosidowski v. Milwaukee,* 152 Wis. 223, 139 N. W. 187; *Van Dinter v. Worden-Allen Co.* 153 Wis. 533, 138 N. W. 1016, 142 N. W. 122.

Defendant claims that from the evidence in the case it should be said as a matter of law that plaintiff assumed the risk. We have, however, been unable to come to this conclusion, and are of the opinion that the question of plaintiff's assumption of risk is one for the jury. Our attention is called to the case of *Gombert v. McKay,* 201 N. Y. 27, 94 N. E. 186, said to be decisive of this case. It was there found that the injured employee knew fully and accurately

the materials and manner of construction of the scaffold, that he was a man of extended experience as to the building and uses of scaffolds, and approved the plan devised by his fellow workmen for the erection of the one upon which he was injured, and the court held that he assumed the risk and therefore defendant was not liable. In the case at bar we have no such state of facts. It is true the evidence shows that the plaintiff assisted in making the change in the scaffold by holding the joist while it was being nailed. But it does not appear that he knew the condition of the piling to which the south end of the joist was spiked nor that he knew of the number of spikes that his fellow workmen used in spiking it to the piling. The fact that Erdman advised the employee who did the spiking, in the presence of plaintiff, to use more spikes, taken in connection with the reply of the workman that it was strong enough and would hold, cannot be said as a matter of law to charge plaintiff with the assumption of risk.

Under the statute (sec. 1636—81, Stats.) it became the duty of the employer to furnish a safe and suitable scaffold for the use of the employee. It is argued that the scaffold originally furnished was safe and suitable, and that it became unsafe by reason of the change voluntarily made by the employees themselves. The change was necessitated by the nature of the work, and it appears that defendant's foreman, Montgomery, was present, saw that it was made, and acquiesced therein. It must therefore be held that the scaffold as changed was in fact the scaffold which the employer was required to furnish the employees, and that the statutory duty to furnish a safe scaffold applied as well to the change or addition thereto as to the scaffold as originally constructed.

The defendant cites the cases of *Brown v. Conners,* 149 Wis. 403, 135 N. W. 857; *Strehlau v. John Schroeder L. Co.* 142 Wis. 215, 125 N. W. 429; *McKillop v. Superior S. Co.* 143 Wis. 454, 127 N. W. 1053; *Howard v. Belden*

*ville L. Co.* 129 Wis. 98, 108 N. W. 48; *Crams v. C. Reiss C. Co.* 125 Wis. 1, 102 N. W. 586; and *Richter v. Union L. Co.* 153 Wis. 261, 140 N. W. 1126, in support of the doctrine that an employer cannot be held liable for furnishing an unsafe place for work where such place is changed by the workmen themselves in the course of their work. So far as the scaffold in question is concerned, this is not such a case. It became necessary to make a single alteration in it in order to enable the workmen to better and more expeditiously do their work. So far as the scaffold was concerned, it was not a place of work that necessarily changed during the progress thereof within the meaning of the cases cited.

Because of the inability to determine from the special verdict, taken in connection with the instructions of the court, what the jury's finding was upon the issue of plaintiff's assumption of risk, the judgment must be reversed and the case remanded for a new trial.

*By the Court.*—Judgment reversed, and cause remanded for a new trial.

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COWAN, Appellant, vs. BEANS and another, Respondents.

*December 10, 1913—January 13, 1914.*

*Appeal from county court: "Person aggrieved:" Proponent of will.*

1. The proponent of a will, who is named as executor therein, is a "person aggrieved" by a judgment of the county court refusing probate to the will, and hence, under sec. 4031, Stats., may appeal from such judgment.
2. Such a person, if he in good faith believes that the will has been wrongfully denied probate by the county court, should appeal from the decision.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Carter & Pedrick,* and oral argument by *S. M. Pedrick.*

For the respondents the cause was submitted on the brief of *John W. Hume* and *Silas Bullard.*

WINSLOW, C. J. In this case it is held that the proponent of a will, who is named as executor therein, is a "person aggrieved" by a judgment of the county court refusing probate to the will, and hence may appeal from such judgment under the provisions of sec. 4031, Stats. 1911.

Such a person is the representative of the testator and is charged with the duty of seeing that the will is probated and its provisions carried into effect. Public policy also requires that a legally executed will be probated, and the person named as executor has a public as well as a private duty to perform. If he in good faith believes that the will has been wrongfully denied probate by the county court, he should appeal from the decision. *Burmeister v. Gust,* 117 Minn. 247, 135 N. W. 980; *Cheever v. Washtenaw Circuit Judge,* 45 Mich. 6, 7 N. W. 186; *Will of Dardis,* 135 Wis. 457, 115 N. W. 332.

*By the Court.*—Order reversed, and action remanded for further proceedings according to law.

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OCONTO LAND COMPANY, Appellant, vs. WALLSCHLAEGER, Respondent.

*December 10, 1913—January 13, 1914.*

*Sales:* Bona fide *purchaser: Conditional sale of timber: Estoppel: Notice: Ordinary course of business.*

1. A conditional vendor who, having given to the vendee possession and apparent authority to sell the property, either expressly or impliedly consents to such sale by the vendee, will be estopped from asserting his rights to the injury of a purchaser

who bought in the ordinary course of business and paid for the property without notice.

2. The mere fact that about one third of the purchase price of lumber was paid by applying thereon a precedent debt of the vendor for advances made to him by the vendee for the purpose of paying for stumpage and secured in part by an executory contract for the sale of the lumber in the following season at the market price, did not render such sale, when consummated, one out of the ordinary course of business.

3. Knowledge by the purchaser of lumber that the vendor was logging on land which did not belong to him, was not notice that the timber so being cut was not paid for or that its sale to said vendor was conditional with title reserved in the owner of the land.

APPEAL from a judgment of the circuit court for Manitowoc county: JAMES WICKHAM, Judge. *Affirmed.*

The plaintiff brought replevin against the defendant for a quantity of lumber, which was delivered on the replevin process and bond to the plaintiff. A verdict for defendant found the value of this lumber at the time the action was commenced to have been $6,621.92, and for this sum, less $370.74 with interest and costs, judgment went for the defendant. The plaintiff claimed title to the lumber by virtue of its ownership of certain lands and a contract relative to the timber thereon as follows:

"The *Oconto Land Company* of the first part, for and in consideration of nine thousand dollars to me paid by Wm. Swenty of Marinette Co. Wis. of the second part, the receipt whereof is hereby acknowledged, have bargained, sold, granted, transferred, assigned and conveyed, and by these presents doth bargain, sell, grant, transfer, assign and convey unto the said party of the second part, his executors, administrators and assigns, all the timber standing & being on the following described lands in Marinette & Oconto Co. with the right to enter upon said lands & remove the same any time within two years, the title to said timber to remain in first party till two certain notes are paid one for $5,000 & the other for four thousand. Land is described as follows," etc.

This contract was signed August 4, 1909, by the plaintiff and William Swenty. There was a verdict as follows:

"(1) Did the defendant purchase the lumber in question from William Swenty in good faith, without any notice of the plaintiff's title thereto? *A.* Yes.

"(2) Did Louis Belongia on March 14, 1910, notify the defendant that the plaintiff had title to the lumber? *A.* No.

"(3) Was the defendant notified of the plaintiff's title to the lumber at the interview in the office of George Beyer at Oconto about the last part of April, 1910? *A.* No.

"(4) If you answer each of the questions (2) and (3) No, then answer this: Did the defendant have any notice of the plaintiff's title to the lumber before the time when he received such notice at Coleman in the early part of May, 1910? *A.* No.

"(5) Did plaintiff authorize William Swenty to sell the lumber to the defendant free from the plaintiff's claim thereto? *A.* Yes.

"(6) At the interview in the office of George Beyer in the latter part of April, 1910, did said Beyer acquiesce in the sale of the lumber by Swenty to defendant and consent that such sale should be free from the plaintiff's claim to the lumber? *A.* Yes."

For the appellant there was a brief by *Classon & O'Kelliher,* attorneys, and *Greene, Fairchild, North, Parker & McGillan,* of counsel, and oral argument by *D. G. Classon* and *J. B. North.*

For the respondent there was a brief by *Kittell & Burke,* and oral argument by *J. A. Kittell.*

TIMLIN, J. The value of the lumber in controversy was $6,621.92 after it had been manufactured, hauled, and when ready for market. The labor liens thereon were $4,000 and the plaintiff's claim for stumpage was $9,000. But there was included in this $9,000 some pre-existing indebtedness of Swenty to the plaintiff. Deducting this at the highest amount claimed and we still have the amount due for stumpage about equal to the manufactured value. The $370.74

deducted from defendant's recovery was the difference between the stipulated market value of the manufactured lumber and the amount paid out by the defendant before he had knowledge or notice of the plaintiff's claim according to the verdict.

It is conceded that the verdict supports the judgment but contended that the evidence does not support the verdict. We find uncontroverted evidence that there was an interview between the defendant and Swenty and Mr. Beyer, representing the plaintiff, at the office of Mr. Beyer in the latter part of April, 1910, after the sale by Swenty to the defendant and after defendant had paid $5,600 on the lumber in the manner hereinafter stated and before the defendant had paid the last $500. It was also uncontroverted that on April 13, 1909, defendant advanced to Swenty $2,100 and that Swenty agreed to sell defendant his next winter's cut of lumber at the market price, the money so advanced to constitute a part payment therefor. During the winter of 1909 and 1910 Swenty entered upon the land described in the aforesaid agreement and cut and removed therefrom and had in his exclusive possession a quantity of the growing timber so purchased which he had sawed into lumber, and this is the lumber in question. It is also uncontroverted that on March 11, 1910, pursuant to the agreement of the year before, Swenty sold and delivered this lumber to defendant at prices then agreed upon, and that there were labor claims unpaid against the lumber which defendant was to pay off as part of the purchase price, and that between March 11, 1910, and the meeting in Mr. Beyer's office defendant paid off $3,500 of these labor claims, and within a week after the said meeting paid out $500 more, making a total, with the advance of $2,100 mentioned, of $6,100. The labor claims so paid were, under the law, a lien prior and paramount to the interest of the plaintiff or that of Mr. Swenty in the lumber. Mr. Beyer testified that at the interview in April,

1910, between himself, Swenty, and the defendant, at which others were present, he knew defendant had bought the lumber from Swenty and therefore did not ask about it, and that he knew the labor claims were a lien thereon and that the defendant had paid some, and he thinks defendant said there were more to pay, and he admits that he said nothing about the plaintiff having any claim on the lumber. Defendant, on the other hand, testifies that at this interview he informed Beyer that he had bought the lumber from Swenty, and Mr. Beyer asked if the labor claims on the lumber were paid; whereupon defendant informed Beyer that he had paid $3,500 on these labor claims and there was about $500 additional labor claims outstanding which would come in. So that, rejecting controverted points for the present, we have here an admission on the part of Beyer that he knew defendant had purchased this property, had paid some labor claims thereon and was about to pay more, and that he did not mention that he had any claim upon or interest in the lumber, or object to this payment, but waited until defendant had paid the remainder of the labor claims. Beyer is apparently conscious that this would not be fair dealing and makes the excuse that he had some time before sent up one Belongia to notify the defendant that the plaintiff owned the property, and that Belongia informed Beyer he had done so. But the jury, upon a substantial conflict of evidence, negatived this evidence of notice through Belongia. Again, Beyer testifies that he authorized Swenty to sell this lumber, only stipulating that Swenty notify him. His exact words were: "I did not care whom he sold it to so long as the party was responsible. I wanted him to notify me, then I would know whom he sold it to, and I wanted to notify the party that I had a claim in that for so much money."

If Mr. Beyer's company had an absolute title and authorized such sale, and the person so authorized, having possession and apparent ownership, sold under that authority

but in violation of the undisclosed condition of its exercise or limitation thereon to the effect that Swenty should notify plaintiff of the sale, and the purchaser had no notice of this limitation and bought the property in good faith, we would have a very ordinary case of one intrusted with the possession of personal property with authority to sell the same, limited only by the requirement in force between the owner and agent but unknown to the purchaser that the selling agent in possession should inform the owner of the name of the purchaser so that the owner might notify the latter of the owner's interest therein. *Young v. Wright,* 4 Wis. 144; *Cowie v. Nat. Exch. Bank,* 147 Wis. 124, 132 N. W. 900, and cases cited in opinion. But the testimony of Mr. Beyer also went beyond this, and fairly bears the interpretation that there was no condition or limitation imposed upon Swenty's authority to sell the lumber, and that he, representing the plaintiff, permitted Swenty to sell the lumber to whom and how he pleased, the plaintiff looking to Swenty, instead of to the purchaser from Swenty, for its pay. This phase of the evidence was responded to by the fifth finding of the special verdict to the effect that plaintiff authorized Swenty to sell the lumber free from the plaintiff's claim. It is contended that there is no evidence to support the verdict in this particular, but we think some such evidence is found in the admissions of Mr. Beyer and in the circumstances attending the transaction, such as the omission to mark the lumber, the act of investing Swenty with authority to sell the amount of the labor claims, and Mr. Beyer's acts and conversations with reference thereto, as well as the peculiar contract, by which, according to some of the testimony of Mr. Beyer, plaintiff sought to protect itself. This was to the effect that Swenty had the right to fix the selling price and to sell when and to whom he chose, which would naturally authorize Swenty to receive the purchase money, if the sale was for cash. Swenty was to notify Beyer of the person desiring to pur-

chase, or the person who had purchased, so that Beyer could notify the latter that the plaintiff had title to the logs. But this would leave Swenty at liberty to take the money of the purchaser and Beyer at liberty to trust Swenty to pay it over to him and so protect the cash purchaser, or to keep it and let Beyer deal with the purchaser. This is not well explained by any of the testimony, and it is a circumstance from which, with the other testimony on the part of Beyer, the jury might infer that there was really no such limitation placed upon Swenty's authority to sell as Mr. Beyer testified. Mr. Swenty testified that he did notify the defendant of this stipulation and that the purchase price of the timber, or the stumpage as it is called, should be paid. The defendant denied this, and the jury responded to this evidence by the answers to the first, third, and fourth questions of the special verdict.

The appellant contends that the lumber was not bought in the ordinary course of business, and bases that contention upon the fact that the $2,100 advanced in April, 1909, was a transaction outside of the ordinary course of business. The defendant testified that at the time he advanced this $2,100 he was informed by Swenty that the latter had bought so much stumpage he could not cut it all during the winter of 1908–1909 because the winter was too short, and asked for the advance to enable him to pay for the whole of the stumpage and cut the remainder the next winter. A contract in writing was then made acknowledging receipt of this $2,100 and agreeing to sell to the defendant on board cars at a designated station Swenty's lumber to be sawed in the winter of 1909 and 1910, consisting of about 600M feet of Norway and white pine, the defendant to pay for such lumber the market price as it would be between the dates of January 1, 1910, and April 1, 1910. If this advance and this contract stood alone there might be ground for appellant's contention. But as an advance payment and an ex-

ecutory contract closed out afterward by actual sale and delivery of the lumber at its market price and a payment of $4,000 additional, there does not seem to us to be anything extraordinary or unusual in the transaction. It first took the form of a loan in part secured by an executory contract of sale at the market price, to be closed or concluded by the payment of the full market price, the purchaser having credit thereon for his advance of $2,100 to Swenty for the purpose of buying the standing timber. Ordinarily it is the last or closing act of the transaction that determines the nature of the purchase and the rights of the parties under it. If defendant at that time paid out $4,000 for the lumber, his title thereby and at that time acquired could not be avoided merely because another third of the purchase price was paid by giving Swenty credit on a pre-existing indebtedness. *Shufeldt v. Pease,* 16 Wis. 659; *Carey v. Dyer,* 97 Wis. 554, 73 N. W. 29.

The defendant had reason to know and did know that the land upon which Swenty was logging in the winter of 1909 and 1910 did not belong to Swenty, hence that the latter bought the timber from some one else. But this cannot be considered notice that Swenty did not pay for the timber or that the sale was conditional, reserving title in the vendor. He had been informed, and had no reason to doubt, that the $2,100 which he advanced to Swenty had been used in the purchase of stumpage and that Swenty had in addition stumpage left over from the year before. The evidence in this case supports the verdict and brings the case within the rule of *Mississippi River L. Co. v. Miller,* 109 Wis. 77, 85 N. W. 193, and *Wing v. Thompson,* 78 Wis. 256, 47 N. W. 606. In the former case it was said:

"The simple principle is that if the conditional vendor, having given the vendee possession and apparent authority to sell the property, either expressly or impliedly consent to such sale by his vendee, he will be estopped from asserting

his rights to the injury of a purchaser who bought in the ordinary course of business, and paid for the property without notice."

The only substantial contention of the appellant in the instant case with reference to *Mississippi River L. Co. v. Miller, supra,* is that the instant case is without the rule of the former case because the property was not bought in the usual course of business. The jury having upon evidence found that Swenty had authority to sell, and this court having arrived at the conclusion that there was nothing out of the usual course of business in plaintiff's purchase, the two cases last cited also control the determination of the instant case and require an affirmance of the judgment.

*By the Court.*—Judgment affirmed.

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BURROUGHS and others, Appellants, vs. JOINT SCHOOL DISTRICT NO. 2, TOWN OF RICHLAND AND CITY OF RICHLAND CENTER, Respondent.

*December 11, 1913—January 13, 1914.*

*Contracts: Construction: "Value:" Proportional payments on building contract: Practical construction: Appeal: Disposition of cause: Taking further evidence.*

1. The term "value" usually means market value, but if such meaning, when applied to a particular contract or conditions growing out of it, leads to results clearly not contemplated by the contract, and it is susceptible of another meaning which harmonizes all the provisions of the contract, such other meaning should be given to it.
2. In a building contract providing for payment in each month of "a sum equal to ninety per cent. of the value of the work done and material furnished during the preceding month, as assessed by the architects," the word "value" is construed to mean, not market value, but *contract value,* i. e. the proportional value of the work and material, based upon the contract price.

3. The fact that under such construction of the contract the owners had overpaid the contractors, does not show a practical construction of the contract, where upon discovery of such overpayment further payments were refused.
4. A practical construction will not be deemed to have been given to a contract by the parties in the absence of knowledge of the facts and circumstances to which that construction relates.
5. In an action upon a building contract and for extras, where plaintiffs had ample opportunity at the trial to present evidence as to all their claims, and it was stipulated that affirmance on appeal of the judgment entered should end the litigation, the cause will not, upon such affirmance, be sent back for the taking of further evidence.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Plaintiffs entered into a written contract with defendant to build a school house for the agreed price of $44,467.28, exclusive of heating, plumbing, and ventilating, as per plans and specifications accompanying the contract. The specifications contained a provision that "once in each and every month during the progress of the work the owners shall pay to the contractor a sum equal to ninety (90 %) per cent. of the value of the work done and material furnished during the preceding month, as assessed by the architects, and the balance thirty days after the completion of the building according to this specification. Provided that for each of said payments the contractor shall obtain from the said architects a certificate signed by them setting forth that the said payment is properly due." After the work had progressed for some time and after the defendant had paid plaintiffs the sum of $28,948.90, it refused to make further payments on the ground that plaintiffs had been paid ninety per cent. of the portion constructed, based upon the contract price. The plaintiffs claimed that they had furnished labor and material of the value of $41,426.48 and that they were entitled to be paid ninety per cent. of such sum, and that by reason of the

refusal of the defendant to pay such ninety per cent. they were compelled to abandon the contract. They sue for the difference between what has been paid them and the value of the labor and material furnished by them as above stated, together with certain amounts claimed due on another cause of action, not pertinent to any question raised by the appeal.

The trial court found, upon practically undisputed evidence, that at the time plaintiffs abandoned the construction of the building it was only seventy per cent. completed, in value, and that the reasonable cost of completing it by the defendant was the sum of $14,702.80. It held as a conclusion of law "That the true construction of that part of the specifications relating to payments is that the value at any time of work done and material furnished must be determined upon a proportional basis—that is, it should be the value relative to and proportional to the contract price." Judgment was awarded to the plaintiffs for the difference between the contract price and the sum of what the defendant had paid plaintiffs and the reasonable cost of completing the building, which difference amounted to $815.58. From such judgment the plaintiffs appealed.

*J. E. Higbee* and *Levi H. Bancroft,* for the appellants.

For the respondent there was a brief by *P. L. Lincoln* and *Jones & Schubring,* and oral argument by *Mr. Lincoln* and *Mr. B. W. Jones.*

VINJE, J. The whole controversy turns upon whether the word "value" in the specification quoted in the statement of facts means market value or contract value. By contract value is meant the value of the material and work furnished based upon the contract price and not upon the market value of the same, if that differs from the contract value. When a building, whose component parts are determined in detail as to form, size, and material by exact drawings and specifications, is agreed to be constructed for a specified sum,

each component part has a value proportional to and based upon the contract price. From such plans and specifications and contract price a supervising architect can determine with substantial accuracy the value of the work and material that have gone into the building at any stage of its erection. The trial court held that the contract value and not the market value of the work and material furnished each month was meant, and that since only seventy per cent. of the value of the building was completed by the plaintiffs, and they had been paid the sum of $28,948.90 on a contract price of $44,467.28, they had been paid ninety per cent. of the value of the material and work furnished by them. The plaintiffs claim they had furnished material and labor of the market value of $41,426.48 and that they were entitled to receive ninety per cent. of such sum.

Usually the term "value" means market value, and in the absence of circumstances showing that another meaning shall be given it, such customary meaning will control. But if it be found that such meaning, when applied to a particular contract, or conditions growing out of it, leads to results clearly not contemplated by the contract read as a whole, and it is susceptible of another meaning which harmonizes with all the provisions thereof, such other meaning must be held to have been within the contemplation of the parties when they entered into it.

If it be true, as plaintiffs claim, that the market value of the work and material was $41,426.48 in completing seventy per cent. of the value of the building which they agreed to build for $44,467.28, and that they were entitled to receive ninety per cent. of the market value of the work and material furnished each month, then they, at the same relative cost for the balance of the building, would be entitled to receive the whole contract price long before they completed it. That such was not the intention is clear from that part of the specification which reads, "and the balance thirty days

after the completion of the building according to this specification." It is a rule in the construction of a contract that, if possible, effect should be given to every part of it. Under plaintiffs' construction and the conditions shown, this part of the contract with reference to the payment of the balance would be annulled. It seems clear from the whole contract that it was the intention of the parties to provide for the payment of ninety per cent. of the value of the work and material furnished each month based upon the contract price, and that the balance should stand as a guaranty of the faithful performance of the contract on the part of the plaintiffs till thirty days from its completion. Such construction gives full force and effect to every part of the contract and leads to no absurd results. It enables the supervising architect who is to furnish the certificate, by an inspection of the work done and material furnished each month, to ascertain its proportional value based upon the contract price, without having to inform himself what the market value of each kind of material and labor is for such month. It gives the builder each month ninety per cent. of what he has put into the building measured by what he is to receive for it when completed, and leaves a guaranty of ten per cent. for faithful performance as contemplated by the contract. Under such a construction it is immaterial whether the market value is above or below the contract value, as the builder each month receives his *pro rata* amount. Under a contrary construction he might receive the full contract price before the completion of the building, or he might, if the market value was much less than the contract value, be compelled to forego receiving from fifteen per cent. to twenty per cent. or more of the contract price till after the expiration of thirty days from the completion of the building. In coming to this conclusion we have not overlooked the cases of *Howard Co. v. Baker,* 119 Mo. 397, 24 S. W. 200, and *Nat. S. Co. v. Long,* 85 Ark. 158, 107 S. W. 384, holding to the contrary. They

seem to do so upon the sole ground that value means market value irrespective of context or of other provisions of the contract. For cases bearing upon the question in which it has been held that relative or contract value is meant under somewhat similar contract provisions, see *Fidelity & D. Co. v. Agnew,* 152 Fed. 955; *Kelley v. Syracuse,* 10 Misc. 306, 31 N. Y. Supp. 283; *Hawkins v. Burrell,* 69 App. Div. 462, 74 N. Y. Supp. 1003.

No practical construction of the contract binding upon the parties was given it by the fact that defendant overpaid plaintiffs. When such overpayments were discovered further payments were refused. There can be no sound basis for a claim of practical construction in the absence of knowledge of the facts and circumstances to which the construction relates.

Plaintiffs contend the case should in any event be sent back for the taking of further evidence either by the court or a referee upon their claims for extras and upon the cost of completing the building by the defendant. It appears, however, from the record that they had ample opportunity to present such evidence upon the trial. Cases cannot be tried piecemeal. The circuit judge was justified in including in his findings of fact the statement, "Should the supreme court affirm the judgment entered upon these findings, it was further stipulated that that should end this litigation."

A number of other questions are discussed in the briefs, but owing to the construction placed upon the contract they become immaterial.

*By the Court.*—Judgment affirmed.

MCKENNA, Appellant, vs. RICKEY and another, Respondents.

*December 11, 1913—January 13, 1914.*

***Garnishment: Banks and banking: Deposits: Special fund not constituting a debt.***

**By an agreement between a bank and S. and R., S. signed R.'s note for $1,500 and placed it with the bank as security; the bank was to honor R.'s check for cattle bought on the following day not exceeding $1,500; R. was to ship the cattle to Chicago, sell them, and deposit the proceeds there to the credit of the bank; and the note was to be used only to indemnify the bank against loss in case the proceeds of such sales did not equal the advances. *Held*, that although for convenience the note was in form discounted and the $1,500 entered on the books of the bank to R.'s credit, his checks thereon could be honored only for the special purpose stated and there was no indebtedness to him which could be garnished by his creditors.**

APPEAL from a judgment of the circuit court for La Fayette county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The plaintiff sued one *Rickey* upon a promissory note and garnished the respondent bank. Having obtained judgment in the principal action, the garnishment action was tried by the court. It is admitted that at the time the garnishee summons was served there was a general credit to *Rickey* on the books of the bank of $1,372.48, and the question litigated was whether that sum represented an indebtedness of the bank to *Rickey*, as in the case of an ordinary deposit, or whether it was a special fund placed in the bank by one Smith in trust for the purpose of assisting *Rickey* in the purchase of stock.

The court made findings of fact and concluded therefrom that the bank was not indebted to *Rickey* at the time the garnishment proceedings were instituted and dismissed the proceedings, from which judgment the plaintiff appeals.

For the appellant there was a brief by *M. J. Cleary* and *Fiedler & Fiedler*, and oral argument by *E. C. Fiedler*.

For the respondents there was a brief by *Orton & Osborn*, and oral argument by *C. F. Osborn*.

WINSLOW, C. J. The circuit court found in substance that it was agreed between the bank and *Rickey* and Smith that if Smith would sign *Rickey's* note for $1,500 and place it with the bank as security the bank would honor *Rickey's* checks or orders for cattle bought on the following day not exceeding $1,500, it being also agreed that *Rickey* should at once ship the cattle to Chicago, sell them, and deposit the proceeds in a Chicago bank to the credit of the defendant bank, the note to be used only to indemnify the bank against loss on its advances in case the proceeds of the sale of the cattle were insufficient to reimburse the bank for its advances.

There was ample evidence to support these findings. The arrangement was not a usual one, perhaps, but we see no ground upon which it can or ought to be condemned if entered into in good faith, with simply an honest intent to protect the bank from loss in making the proposed advances to *Rickey*. There does not appear to be any ground upon which the good faith of the parties can be successfully challenged here. It is quite plain that under this arrangement the bank never became indebted to *Rickey* in any sum. The formal discounting of the note and the entry of the $1,500 on the books to *Rickey's* credit were simply bookkeeping entries made for convenience in disbursing the moneys which the bank had agreed to advance; but they made no necessary change in the legal relations of the parties. The bank was required to honor *Rickey's* checks for cattle bought on that day, but (under its arrangement with Smith) could not honor a check for any other purpose. If it had become *Rickey's* debtor it would be obliged to honor any check. This test seems decisive.

*By the Court.*—Judgment affirmed.

WISDOM, Appellant, vs. WISDOM, Executor, Respondent.

*December 11, 1913—January 13, 1914.*

*County courts: Settlement of estates: Claims: Constructive trusts: Concurrent jurisdiction of circuit court: Discretion.*

1. The county court has full jurisdiction, in law as well as in equity, in respect to all controversies involved in the settlement of the estates of decedents; and the concurrent jurisdiction of the circuit court should not be exercised unless that court can afford more complete and adequate relief than can be had in the county court.
2. A money demand against the estate of a decedent, the amount of which is to be determined by an accounting as between trustee and *cestui que trust*, should ordinarily be litigated in the county court, though circumstances may warrant the circuit court in taking jurisdiction. Whether the circuit court should do so or not is so largely a matter of discretion that its determination will not, in general, be disturbed on appeal.
3. Where one person has money of another and without the latter's consent invests it in property, taking the title in his own name, such property is impressed with a trust, and the money so fraudulently used can be recovered out of it, provided it can be clearly traced into it and the rights of other persons who have dealt with the property in good faith and without fault will not be prejudiced.
4. In an action to charge with such an implied trust real property of which plaintiff's husband died seised, it appearing that the persons to whom the lands were devised and other persons who would be affected by the litigation were not made parties but were parties to the pending proceedings to settle the estate in the county court, and there being no good reason why that court should not deal with all the matters involved, an order sustaining a demurrer to the complaint is affirmed without prejudice to the plaintiff's right to proceed in the county court.

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Action to establish and enforce a trust affecting the estate of Frank Wisdom, deceased.

Deceased, the husband of plaintiff, died testate. When this action was commenced his estate was in process of settle-

ment in the county court of Grant county. It consisted of both real and personal property. The personalty was bequeathed, partly to a daughter, partly to a son, and partly to appellant. The real estate was substantially all devised to the son for life with remainder over to his lawful children, to whom was also devised the interest of which the testator died seised in the homestead after the lapse of a life estate given to appellant.

The facts aforesaid appeared by the complaint in connection with a statement to this effect: When appellant was married to the testator she possessed considerable personal and real property and, soon thereafter, she purchased with her own money other realty. The testator then did not have any property. Soon after the marriage they removed to the lands specified, of which appellant owned an undivided two-sevenths interest, and they made their home thereon until the testator died. Upon going into possession of such land the deceased, without appellant's consent and in defiance of her express objection, took control of all her property and continued thereafter to use the same as his own until he died. During such dominion, he acquired the remaining five sevenths of the land aforesaid and other lands and property; paying for the same out of the proceeds and income from appellant's property, and taking the title in his own name without her knowledge or consent. He not only invested appellant's money in property, but converted such property into money and reinvested the same, all without her knowledge or consent. He used the proceeds of her property, from first to last, as his own, reinvesting some thereof, spending some to satisfy his desires, and neglecting and refusing to account for any thereof to appellant. Upon discovering that deceased had taken title to all the lands acquired by him with her money in his own name, appellant remonstrated and demanded to have her share placed in her name. He recognized her right and lulled her into security

by various assurances and among them by falsely representing that he had provided by will for her getting her full share. In fact he devised and bequeathed substantially all the property he accumulated, and her property as well, to his children by a former wife. The property of appellant which was held by the testator when he deceased, amounted to $14,700, or more.

The prayer was broad enough to cover any relief which appellant might, upon a trial, show herself entitled to, the object, in the main, being to obtain an accounting of the transactions of the testator with her property, establish a constructive trust against his estate, and to enforce such trust.

For the appellant there was a brief by *Hayes & Heffron* and *W. E. Howe,* and oral argument by *Mr. Howe.*

*John J. Blaine,* for the respondent.

MARSHALL, J. The trial court sustained the demurrer, as appears from an opinion filed, solely upon the ground that the pleaded facts failed to disclose anything but such a mere legal claim against the estate of Frank Wisdom, deceased, as the county court, having charge of the administration of the estate, has exclusive jurisdiction of.

It may well be that the demurrer was rightly sustained and, yet, the complaint disclose a cause of action for the enforcement of an implied trust. The county court has full jurisdiction, in law as well as in equity, in respect to all controversies involved in the settlement of the estates of deceased persons. Sec. 2443, Stats.; *Brook v. Chappell,* 34 Wis. 405; *Catlin v. Wheeler,* 49 Wis. 507, 5 N. W. 935; *Tryon v. Farnsworth,* 30 Wis. 577; *Carpenter v. United States F. & G. Co.* 123 Wis. 209, 101 N. W. 404. The circuit court has concurrent jurisdiction; but should not exercise it unless the circumstances are such that the county court cannot afford as complete and adequate remedy as the circuit

court. In any case, where the circuit court has power to deal with the subject involved, in the absence of any good reason why the controversy cannot as well be settled by litigation in the county court, the former should be considered as without jurisdiction. *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704; *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304.

So, if the facts pleaded are sufficient to show the estate of the deceased, or some part thereof, to be impressed with a trust in appellant's favor,—that her claim is something more than a mere simple indebtedness,—yet, if it, clearly, can as well or better be dealt with in the county as in the circuit court, then the order appealed from must be sustained on that ground.

We cannot agree with the conclusion reached below that the complaint discloses only a money demand. There are ample allegations to show that Mr. Wisdom, without appellant's consent, used her property and the proceeds thereof as his own; that he converted her property into money and, while holding the same as trustee with the income of other property legally belonging to her, or equitably because the same was purchased with her money and the title taken in his name without her consent, he reinvested the same or part thereof in property he possessed at the time of his death.

It is a familiar principle that if a person has money of another and, without the consent of such other, invests such money in property and takes title in his own name, such property is impressed with a trust, denominated an implied or constructive trust, in favor of such other, and money so fraudulently used can be recovered out of such property, subject only to the condition that it must be clearly traced thereinto, and that the rights of persons who may have dealt with the property in good faith and without fault, supposing such person to have had, in fact, the relation thereto which he assumed to have, must be deemed paramount to the rights

of such other. The statute, sec. 2079, expressly excepts such common-law trusts from the terms of the written law on the subject of uses and trusts. *Kluender v. Fenske,* 53 Wis. 118, 10 N. W. 370; *Perkinson v. Clarke,* 135 Wis. 584, 116 N. W. 229; *Bosworth v. Hopkins,* 85 Wis. 50, 55 N. W. 424.

The complaint, very clearly, states facts sufficient to call for an investigation with reference to the application of the foregoing stated principle. It also states facts showing that appellant has a claim against the Wisdom estate of a purely legal character, in addition to the case made to charge property which Mr. Wisdom died possessed of with an implied trust. The allegations to the effect that Mr. Wisdom used up considerable sums of appellant's money which he held as her agent and for which he was liable to account, relate to a claim of the latter character. It is not alleged that these further sums were invested in property which Wisdom had at the end. As to such sums, manifestly, appellant had only a money demand against her husband's estate; the amount to be determined by an accounting as between trustee and *cestui que trust.* A matter of that kind can, ordinarily, be as well litigated in the county as in the circuit court, though circumstances might be such as to warrant the latter in taking jurisdiction. However, whether to do so or not rests so largely in the discretion of the trial judge that his determination would, in general, be regarded as conclusive on appeal.

There are weighty reasons in this case why the circuit court should not take jurisdiction. First, as we have indicated, all matters involved are within the jurisdiction of the county court and there are no very good reasons why that court should not deal with them as part of the administration of the estate. Second, the claim of appellant affects the real estate of which Mr. Wisdom died seised and the persons to whom it was devised are not parties to the action. There

are many other persons who would be affected by the litigation who were not parties defendant. Only the executor is such. The litigation could not be allowed to proceed without bringing in all whose interests are involved. They are parties to the proceedings to settle the estate in county court and can protect their rights there.

So, while the order appealed from must be affirmed, the particular reason given for the decision below, is not approved and appellant is left without prejudice to her right to proceed in the county court to obtain relief of the same nature as she sought in circuit court.

*By the Court.*—The order is affirmed.

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DOLPHIN, Respondent, vs. PEACOCK MINING COMPANY, Appellant.

*December 11, 1913—January 13, 1914.*

***Master and servant: Injury to miner: Negligence: Unsafe working place: Fall of rock: Contributory negligence: Duty of inspection: Customary methods: Changing working place: Evidence: Credibility: Special verdict: Form: Instructions to jury: Excessive damages: Appeal: Harmless errors.***

1. The finding of the jury upon the issue of contributory negligence will not be disturbed upon appeal if there is any credible evidence to support it.
2. In an action by a miner to recover for injuries caused by the fall of a large rock from the wall at which, by direction of defendant's ground boss, he was working as assistant to a driller, upon evidence showing, among other things, that he had no knowledge of the stone being loose, that such loosened condition was apt to occur from blasting, but, the mine not being well lighted, it often required careful inspection with the aid of a candle to discover it, and that it was the duty of the ground boss and the shovelers to make such inspection, it is *held* that plaintiff was under no obligation to test or inspect the wall himself, but had a right to rely upon the inspection made by the ground boss and shovelers unless the danger was

open and obvious to him, and that the question of his contributory negligence was one for the jury.

3. In such case, the fact that the stone fell very soon after plaintiff began working at the wall was persuasive evidence that it was loose and dangerous, and this, coupled with evidence tending to prove that the ground boss discovered such condition of the wall some days before and sent plaintiff there to work without warning him of the danger, was sufficient to sustain a finding of negligence on the part of the defendant mining company.

4. Testimony of the ground boss that when plaintiff went to work at the place of injury the rock was loose and dangerous to his knowledge, being corroborated by many facts and circumstances in the record, cannot be held incredible on appeal merely because he had made statements out of court which were not in harmony with such testimony. Such statements went only to his credibility, which was a question for the jury.

5. The dangerous condition existing at the place where plaintiff was set at work, to the knowledge of defendant and unknown to plaintiff, proof that defendant adopted the usual and customary methods of doing the work did not relieve it of liability.

6. The doctrine that a master is not liable for failure to provide a safe place to work where the employees themselves are engaged in preparing the working place which is constantly changing as they proceed with their work, has no application to the case here presented; and an instruction embodying such doctrine was properly refused.

7. The inclusion in the special verdict of a question as to whether the ground boss notified plaintiff before the accident that the upper part of the wall in question had separated from the roof of the drift, answered by the court "No," was not prejudicial error, especially since no different form of questions was requested and no objection made to the form of the special verdict submitted.

8. A special verdict which is framed upon the assumption that one material controverted question will be answered favorably to the plaintiff, though in bad form, was not prejudicially erroneous where the court specially charged the jury that there was no intention to intimate how such question should be answered.

9. It is not prejudicial error to refuse a requested instruction which, though good law in the abstract, could not have aided the jury in answering the question to which it was directed.

**10 Where plaintiff, at the time of his injury, was twenty-five years of age and in perfect health, had a wife and one child dependent upon him, and was earning $2.25 per day, and his injuries were of a most serious character, causing much pain and suffering and total and permanent inability to work, an award of $11,000 was not excessive.**

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This action was brought to recover damages sustained by plaintiff on account of injuries received in the defendant's mine through the negligence of the defendant. The following verdict was returned:

"(1) Was the plaintiff injured on the 21st day of May, 1912, by the fall of a large stone that was a part of the south wall of the drift in the defendant's mine, which stone projected from the top of said wall over the place where the plaintiff was set at drilling by Cushman, the defendant's ground boss, who had the direction of the underground workings of said mine? *A.* Yes (by the court).

"(2) Before the plaintiff began to drill on the day in question, had the wall above the place where he was at work separated from the cap-rock which formed the roof of the drift? *A.* Yes.

"(3) Did said ground boss, before he set the plaintiff at work drilling at said place, know that the top of the wall at said place had, to some extent, separated from the cap-rock that formed the roof of said drift? *A.* Yes.

"(4) Should said ground boss, as a man of ordinary care, prudence, and experience as a miner, under all of the facts and circumstances, have known that by reason of the separation of the upper stone of said wall from the cap-rock the place where he set the plaintiff at work was probably an unsafe place to drill and have warned the plaintiff of the condition of the wall? *A.* Yes.

"(5) Did Cushman inform the plaintiff before the accident that the upper part of the wall where he set him at work had separated from the roof of the drift? *A.* No (by the court).

"(6) Was the plaintiff aware of the condition of the wall at that place? *A.* No.

"(7) Was Cushman wanting in ordinary care, that is, was he negligent in setting the plaintiff at work drilling at the place in question without notifying him of the condition of the top of the wall, and ought Cushman, as a man of ordinary care, intelligence, and experience as a miner, to have reasonably foreseen under the attending circumstances that in setting the plaintiff to drill in that wall without warning him of its condition, that as a natural and probable result of so doing it was to be reasonably apprehended that a personal injury to the plaintiff might probably result? *A.* Yes.

"(8) Was the plaintiff guilty of any want of ordinary care which contributed to produce the injury he received? *A.* No.

"(9) If the court should decide upon your answers to these questions that the plaintiff is entitled to recover, what sum of money will compensate him for the injury he received? *A.* $11,000."

Judgment was rendered in favor of the plaintiff upon the verdict, from which this appeal was taken.

For the appellant there was a brief by *T. M. Priestly* and *Aylward, Davies & Olbrich,* and oral argument by *J. A. Aylward.*

For the respondent there was a brief by *Fiedler & Fiedler,* and oral argument by *E. C. Fiedler.*

KERWIN, J. The plaintiff was injured on the 21st day of May, 1912, while at work in the defendant's mine. He was employed as an assistant to the driller, one Byke. The mine is located in Iowa county, Wisconsin. At the time of the injury it was being operated by running a drift seven feet high and between forty and sixty feet wide easterly from the main shaft and about 100 feet below the surface of the ground. The drift was carried through the rock to a point about 1,200 feet from the main shaft. The material being removed from the drift as it was carried eastward consisted of limestone,

glass rock, clay bed, and brown rock, and over the brown rock lay the cap-rock, which formed the cap or roof of the drift. Supporting pillars of natural rock were left through the center of the drift. Also there were supports constructed by gobbing and timbering at different points along the drift. Gobbing consists of making piles of barren or non-ore-producing rock extending from the floor to the cap-rock or roof.

The accident occurred on the south wall or side of the drift, about twenty feet from the easterly end or forehead thereof. The work in the mine at the time of the injury was carried on by first drilling a series of holes either in the side wall or the forehead. These holes were loaded with sticks of dynamite, which were exploded in the evening after the workmen had gone, and in the morning the drillers proceeded with their drilling in another part of the mine and the shovelers cleaned the rock loosened by the blast and the trammers carried the ore-bearing rock to the shaft over the tramway.

A large rock in the south wall, four and one-half feet from the floor and projecting two or three feet from the side wall up near the cap-rock or roof and weighing from 3,500 to 4,000 pounds, fell upon the plaintiff and injured him while he was engaged in assisting the driller.

The negligence alleged is that the defendant failed to furnish a safe place for plaintiff to work, in consequence of which unsafe and dangerous condition of the mine the plaintiff was injured by the fall of the rock in question; that the defendant had knowledge that the place was dangerous and failed to inform plaintiff thereof. The complaint also alleges that on the 21st day of May, 1912, or at any time prior thereto, the defendant had not filed with the Industrial Accident Board of Wisconsin a written statement to the effect that it would accept the provisions of ch. 50 of the Laws of 1911 of the state of Wisconsin, and the defendant was not on said day nor prior thereto subject to the provisions of said act. This allegation is admitted.

The several assignments of error will be considered in the order discussed in appellant's brief. It is first contended that a verdict should have been directed (a) because the undisputed evidence shows that the plaintiff was guilty of contributory negligence, and (b) that there was no evidence sufficient to warrant the jury in finding the defendant guilty of negligence.

1. Counsel for appellant makes no claim that assumption of the ordinary hazards of the employment is a defense, but insists that plaintiff was guilty of contributory negligence as matter of law, because he knew or ought to have known that the place was dangerous; that he was familiar with the premises and work and assisted in making the working place; that the mine was well lighted and the danger as obvious to the plaintiff as to the defendant's foreman.

On the part of plaintiff it is contended that no duty rested upon plaintiff or the driller, Byke, to inspect or prepare the working place for the driller, but on the contrary that duty was especially delegated to the ground boss, one Cushman, and that he and the shovelers were charged with that duty; that the mine was not well lighted and the danger not obvious, and was unknown to plaintiff but known to defendant. The jury found that the plaintiff was not guilty of contributory negligence, and under the repeated decisions of this court the finding cannot be disturbed if there is any credible evidence to support it.

The evidence shows that it was the duty of the shovelers, under the charge and direction of the ground foreman, to make inspection after the blasting and test the rock with pick and hammer, and also examine the cracks in the rocks with the aid of a candle and clear away all loose rock; that no duty to inspect rested upon plaintiff or the driller; that their only duty was to drill after the place had been prepared for them; that aside from the rocks removed by the blasting, other rocks are shattered or cracked but remain unmoved from the walls

or forehead, so that careful examination and inspection becomes necessary in order to determine whether such rocks are dangerous to persons working under or near them.

There is evidence that plaintiff did not know that the rock which fell and caused the injury was loose or dangerous, but counsel says he should have examined it. The plaintiff was under no obligation to test it or make inspection of it. He had a right to rely upon inspection by the ground boss and shovelers, whose duty it was to inspect, unless the danger was open and obvious to him. There is evidence that the danger was not obvious, that the mine was not well lighted, that each man carried a candle, and that in order to discover the dangerous condition of rocks it was often necessary to examine the cracks with the aid of a candle, in order to discover signs of separation or settlement.

There was no duty on the part of the driller to inspect or examine, and, even if so, his negligence could not be attributed to the plaintiff. Sec. 2394—1, Stats. Neither Byke nor plaintiff had anything to do with clearing away the rock after the blasting and nothing to do with preparing the place where they drilled. They drilled where they were ordered to drill by the ground boss, Cushman. Plaintiff's duties were to do what he was ordered to do by the driller. He testified: "My duties were to assist the drillman. I was backer. That was to drill and break ground and put in shots. I was only assistant man. I helped set up the machine and keep the bolts tight and changed the steel and squirted the water in the hole that was drilled."

Counsel for appellant argues that the evidence shows that the mine was well lighted. There is, however, conflict on this point. Byke, the driller, testified that the mine was dark, that every man carried a candle, no lights sticking around, no lamps, no electric lights, gob comes close to the pillar, you can't see there. The witness further testified that you would have to put the candle up close to see the rock.

There is ample evidence that the dangerous condition of the rock could only be discovered by holding a candle close to it, in view of the poorly lighted condition of the mine. Counsel cites us to evidence of plaintiff that he had all the light he wanted in his work. True, he carried a candle and that doubtless was sufficient for his work, but not sufficient to light up the mine. Byke, the driller, testified:

"*Q.* Was there any light over by this pillar where you were sent to drill? *A.* No; gob comes close to the pillar, you can't see there . . . here is the pillar south; throw the rock back up against the pillar; can't see from there one side to the other.

"*Q.* If you didn't have any candle, no light there, could you see the rock? *A.* No.

"*Q.* You would have to put the candle right close up to it? *A.* Yes, to see it.

"*Q.* You had all the candles you wanted, didn't you? *A.* Yes, can't carry more than one candle.

"*Q.* And you had all the light you wanted, didn't you? *A.* Well, we had one candle."

About three weeks before the injury the plaintiff and Byke, the driller, had blasted at the place in question and the ground boss and shovelers cleared away the rock blasted out, and the projecting rock which fell remained. This condition continued for about three weeks while plaintiff was working in other parts of the mine, when the ground foreman sent the driller and the plaintiff to drill close to the rock, and shortly after they commenced drilling the rock fell and caused the injury complained of. There is evidence that during the time the plaintiff was working in another part of the mine the ground foreman discovered that the place in question was dangerous and sent the plaintiff and the driller there to work without warning them of the danger. Upon the evidence in the record we are convinced that the question of contributory negligence was for the jury. *Jakopac v. Newport M. Co.* 153 Wis. 176, 140 N. W. 1060; *Holloway v. H. W.*

*Johns-Manville Co.* 135 Wis. 629, 116 N. W. 635; *Hamann v. Milwaukee B. Co.* 136 Wis. 39, 116 N. W. 854; *Landry v. G. N. R. Co.* 152 Wis. 379, 140 N. W. 75.

A long line of cases is cited by the learned counsel for appellant to the point that the evidence shows as matter of law that plaintiff was guilty of contributory negligence. *Hulien v. C. & N. W. R. Co.* 107 Wis. 122, 82 N. W. 710; *Jacoby v. C. & N. W. R. Co.* 137 Wis. 131, 118 N. W. 635; *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992; *Hynes v. Holt L. Co.* 147 Wis. 172, 132 N. W. 889; *Larsson v. McClure,* 95 Wis. 533, 70 N. W. 662; *Schiefelbein v. Badger P. Co.* 101 Wis. 402, 77 N. W. 742; *Gardner v. Paine L. Co.* 123 Wis. 338, 101 N. W. 700; *Gossens v. Mattoon Mfg. Co.* 104 Wis. 406, 80 N. W. 589; *Erdman v. Ill. S. Co.* 95 Wis. 6, 69 N. W. 993; *Foss v. Bigelow,* 102 Wis. 413, 78 N. W. 570. In these cases the danger was obvious and the plaintiff put himself in position of peril. In the *Jacoby Case,* 137 Wis. 131 (118 N. W. 635), at page 135 the court said: "He knew the work was dangerous and that the rules of the company explicitly prohibited him from doing the very thing he did do." In *Hulien v. C. & N. W. R. Co., supra,* the plaintiff deliberately put himself in a place of danger with full knowledge of the danger. In *West v. Bayfield M. Co., supra,* the court held the question of contributory negligence was for the jury. In *Hynes v. Holt L. Co., supra,* the danger was apparent, and the plaintiff created the dangerous condition and understood the situation and knew the danger and needed no warning. *Larsson v. McClure, supra,* involves the question of assumption of risk. In *Schiefelbein v. Badger P. Co., supra,* it was held that no negligence of defendant was shown and that the cause of the injury was perfectly apparent. In *Gardner v. Paine L. Co., supra,* it was held that the danger was apparent. The court said: "The danger signal was before him, and could not be mistaken except through the most heedless inattention." In

*Gossens v. Mattoon Mfg. Co., supra,* the *Erdman Case,* and the *Foss Case* it appeared that the danger was open and obvious. So it will be seen that the cases relied upon by appellant under this head are not controlling here.

2. Respecting the negligence of the defendant little need be said. The jury found the defendant guilty of negligence which was the proximate cause of the injury, and there is ample evidence to support the findings. Counsel for appellant attacks the answer of the jury to the second question as not supported by the evidence. The fact that the rock fell shortly after plaintiff began to work under it is quite persuasive that it was loose and dangerous. *Cummings v. Nat. F. Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Mulcairns v. Janesville,* 67 Wis. 24, 29 N. W. 565; *Klitzke v. Webb,* 120 Wis. 254, 97 N. W. 901; *Parker v. Fairbanks-Morse Mfg. Co.* 130 Wis. 525, 110 N. W. 409; *Schmidt v. J. G. Johnson Co.* 145 Wis. 49, 129 N. W. 657.

But in addition to this we have the positive testimony of the ground boss, Cushman, that when plaintiff went to work at the place of injury the rock was loose and dangerous, to his knowledge. A very vigorous attack is made by counsel for appellant on this evidence of Cushman, and his evidence is denominated perjured evidence. True, it appears in the record that Cushman made statements out of court out of harmony and in conflict with his testimony in court. His statements out of court were not under oath, and many facts and circumstances appear in the record which indicate that his testimony in court was true. However, the question of its credibility was for the jury. On this point counsel for appellant relies on *Groth v. Thomann,* 110 Wis. 488, 86 N. W. 178; *A. C. Conn Co. v. Little Suamico L. Mfg. Co.* 74 Wis. 652, 43 N. W. 660. It will be seen that in *Groth v. Thomann* the physical facts were such as to leave no question for the jury, and in *A. C. Conn Co. v. Little Suamico L. Mfg. Co.* it was held that testimony that a witness made

statements out of court on material facts different from his testimony in court is competent impeaching testimony.

It is further insisted that no breach of duty was shown on the part of appellant. This contention is based chiefly upon the proposition that where the danger is open and obvious no duty to warn rests upon the master. We have shown that whether the danger was open and obvious was a jury question, and the finding of the jury upon that question cannot be disturbed. *McMahon v. Ida M. Co.* 95 Wis. 308, 70 N. W. 478; *Nix v. C. Reiss C. Co.* 114 Wis. 493, 90 N. W. 437.

It is further urged by appellant that, even if the danger did exist, defendant was not liable if it adopted the usual and customary methods of doing the work. This contention is unsound. Ch. 485, Laws of 1911; *Sparrow v. Menasha P. Co.* 154 Wis. 459, 143 N. W. 317. It is also contended by appellant that there was no liability for the dangerous condition, if it in fact existed, because the plaintiff with other employees was engaged in preparing the working place and that such place was constantly changing, and that questions along these lines should have been submitted to the jury. Counsel relies under this head upon *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 79 N. W. 22. But the doctrine of that and other similar cases has no application to the instant case. Ch. 485, Laws of 1911; *Sparrow v. Menasha P. Co., supra.*

3. Error is assigned in the submission of the special verdict and in answering the fifth question thereof. The criticism of the verdict is that subsequent questions are based upon the assumption that the jury would answer question No. 2 "Yes." The verdict obviously is not in good form in the regard complained of. It appears from the record, however, that when the court's attention was drawn to the point it charged the jury upon the question, making it clear that there was no intention to intimate how any question should

be answered. The form of a special verdict is largely in the discretion of the trial court. *Lemke v. Milwaukee E. R. & L. Co.* 149 Wis. 535, 136 N. W. 286; *Milwaukee T. Co. v. Milwaukee,* 151 Wis. 224, 138 N. W. 707; *Gunsten v. Green,* 153 Wis. 413, 141 N. W. 239.

Nor was it error to include the fifth question in the verdict which was answered by the court. *Baumann v. C. Reiss C. Co.* 118 Wis. 330, 95 N. W. 139; *Keena v. American B. T. Co.* 144 Wis. 231, 128 N. W. 858. Question 5 was not submitted to the jury, and the answer to it by the court, in view of the charge given on the point, could not have prejudiced the jury. Moreover, it does not appear that any different form of questions was requested, and no objection made to the form of the verdict submitted and no exception taken. If the verdict was objectionable in form, counsel should have objected and entered due exception to the refusal of the court to correct it. *Ludvigson v. Superior S. B. Co.* 147 Wis. 34, 132 N. W. 621.

4. Error is assigned in refusal to instruct as requested. The defendant requested the following instructions, which were refused:

"1. In regard to the seventh question of the special verdict I instruct you as follows: The presumption of fact at the start as to any given situation, where liability of the master to the servant or through him is in controversy, is that the duties of the former have been performed, and such presumption should prevail, whenever the fact is called in question, until overcome by evidence establishing the contrary to a reasonable certainty."

"2. In regard to the fourth question of the special verdict I instruct you as follows: Where the dangers of the working place are created by the servants and employees of the master, including the foreman, and changed from time to time in the due course of operations, the master is under no duty to furnish a safe place for the servants to work, because that duty has been imposed upon the servants themselves by the master."

Respecting the first instruction we cannot see that any prejudicial error was committed in refusing it. It is doubtless good law in the abstract, but we do not see that it was strictly applicable to the seventh question, or could have aided the jury in answering it. The instruction might have been applicable to some other question of the verdict, for example question No. 2, but we are unable to see how it could aid the jury in answering question No. 7.

Nor do we think there was any prejudicial error in refusing the second instruction requested. It had no application to the facts in this case. This instruction was based upon the doctrine of *Knudsen v. La Crosse S. Co.* 145 Wis. 394, 130 N. W. 519. But in the *Knudsen Case* a safe place was furnished, and was rendered unsafe by a crew of which Knudsen was one, while doing the work which created the danger and caused the injury. *Sparrow v. Menasha P. Co.* 154 Wis. 459, 143 N. W. 317.

5. Error is assigned in refusing to change the answers to questions 4, 6, and 8. Nothing further need be said upon this assignment of error. The answers to these questions were for the jury. There is ample evidence to support the findings.

6. It is also urged that the damages are excessive. Prior to the injury the plaintiff was in perfect health. He was twenty-five years of age, had a wife and one child dependent upon him for support, and was earning $2.25 per day. The injuries were of the most serious character and the pain and suffering great. There is evidence that he will never be able to work again and that no treatment can restore him to normal condition. After a careful examination of the evidence we do not feel warranted in holding that the damages are excessive.

7. A motion was made in the court below for a new trial on the ground of misconduct of the jury. This motion was based upon affidavits which appear in the record. The

court denied the motion, and we are convinced from a careful examination of the record and the affidavits used upon the motion that no error was committed in this regard. We find no prejudicial error in the record and are convinced that the judgment of the court below should be affirmed.

*By the Court.*—The judgment is affirmed.

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OLMSTED, Appellant, vs. TOWN OF GREENFIELD, Respondent.

*December 11, 1913—January 13, 1914.*

*Highways: Defects: Injury to automobile: Contributory negligence.*

**A verdict finding plaintiff guilty of contributory negligence is supported by evidence that, while driving an automobile at the rate of twelve miles per hour, he left the main track of a country road, and that the under part of his car struck and was damaged by a stump ten inches high which was in the middle of the traveled sidetrack and, though partially concealed, was visible for a distance of fifty to seventy-five feet.**

APPEAL from a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Minahan & Minahan,* and oral argument by *E. R. Minahan.*

For the respondent the cause was submitted on the brief of *Thorwald P. Abel.*

TIMLIN, J. Where there is evidence tending to show that in the center of a traveled sidetrack of a country road there is an oak stump ten inches high partially concealed by green oak sprouts about two feet high and by weeds, but visible to one approaching from the west for a distance of fifty to seventy-five feet, and the plaintiff going east in an automobile at the rate of twelve miles per hour left the main traveled track and took this sidetrack, and the under part

of his automobile struck this stump and was damaged, a verdict finding plaintiff guilty of contributory negligence is not without evidence to support it.

*By the Court.*—Judgment affirmed.

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CULVER, Respondent, vs. MARX, Appellant.

*December 12, 1913—January 13, 1914.*

*Slander: Evidence: Questions for jury.*

**In an action for slander where, although the witnesses differed as to the exact language used by defendant, his words could not have been understood as meaning anything else than, as stated in the complaint, that plaintiff was running a house of ill-fame, there was no error in submitting to the jury the question of damages only.**

APPEAL from a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This action was brought to recover damages for slander. The alleged slanderous words set forth in the complaint are as follows: " 'I don't have to use my wife for immoral purposes' (thereby falsely imputing that the plaintiff's wife was unchaste and that plaintiff profited thereby)." " 'You run a house of ill-fame. Your wife gets fellows into trouble and you settle with them by taking their notes' (thereby imputing that plaintiff and his wife were guilty of blackmail, extortion, and of obtaining money under false pretenses)."

At the close of the evidence the court stated that in his opinion the only question to submit to the jury was that pertaining to damages. The court, among other things, charged the jury that the defendant said to and of the plaintiff in the presence of certain persons that plaintiff kept a house of prostitution. The court further charged:

"The undisputed evidence in this case substantiates that charge, that is, there is no evidence in the case which in the

opinion of the court is susceptible of any other construction than that he did speak those words of and concerning the plaintiff in the presence of those men. That means that he charged him with that which under our law is a crime; therefore the law implies damage. It is termed slanderous *per se,* and the law therefore presumes that damage has occurred to the plaintiff by reason of the speaking of those words."

The jury returned a verdict for $250 compensatory damages and $350 punitory damages. From a judgment in accordance with such verdict the defendant appeals.

For the appellant there was a brief by *Thorwald P. Abel,* attorney, and *Daniel H. Grady,* of counsel, and oral argument by *W. H. Farnsworth.*

For the respondent there was a brief by *Masters, Graves & Masters,* attorneys, and *C. W. Graves,* of counsel, and oral argument by *R. B. Graves.*

BARNES, J. There were four witnesses sworn on the trial. The appellant argues that if the correct version of the transaction was given by two of these witnesses, the defendant did not charge the plaintiff with running a house of ill-fame, or at least the jury might find that the defendant did not so charge.

We have read the testimony, which is very brief, and think it is susceptible of but one construction, and that the trial court was correct in holding that the defendant did state that plaintiff was running a house of ill-fame. The defendant and Dr. Morrison gave a little different version of what was said than that of the other witnesses, but it is clear from their testimony that the defendant meant to state that the plaintiff was running a house of ill-fame and that the language used could not be understood as meaning anything else. The judgment is correct and should be affirmed.

*By the Court.*—Judgment affirmed.

TOURTELLOTTE and another, Appellants, vs. NEW YORK LIFE INSURANCE COMPANY, Respondent.

*December 12, 1913—January 13, 1914.*

*Life insurance: Construction of contract: Tontine policy: Illustrative statement: Cash value not guaranteed.*

**A life insurance policy provided that at the end of twenty years, if it was then in force, the insured might, at his option, "withdraw in cash the entire equity (that is, the net reserve, being $3,607.20, and in addition thereto the accumulated surplus" apportioned by the company to the policy). Delivered with the policy, but not attached to it, was a statement purporting to "illustrate" the contract but containing no words of promise or guaranty. This statement showed a cash value of $8,160 at the end of twenty years, but the figures used therein were expressly said to be "based on the results realized on tontine policies which have matured during the current year in this company." Treating such statement as a part of the contract of insurance, it is *held* that it did not change the policy so as to make it guarantee or promise a cash value of $8,160 at maturity. *Timlin v. Equitable L. Assur. Soc.* 141 Wis. 276, distinguished.**

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to recover the amount of $8,160 claimed to be due on an insurance policy, less the sum of $3,420 admitted to be owing from plaintiff *Tourtellotte* to defendant upon a loan evidenced by his note. In 1892 the plaintiff *Tourtellotte* made application to the defendant for a distribution policy of $10,000 with a special guaranty and mortuary dividend. The policy of insurance, in the usual form, numbered 454,346, was delivered to him pursuant to the application. The policy contained, among other provisions, the following:

"This policy is issued on the distribution policy plan, the particulars of which are as follows:

"That the distribution period for this policy be completed on the 28th day of February in the year nineteen hundred and twelve.

"That no dividend of surplus shall be allowed or paid upon this policy, unless the insured shall survive until completion of its distribution period, and unless this policy shall then be in force.

"That surplus or profits derived from such policies on the distribution policy plan as shall not be in force at the date of the completion of their respective distribution periods, shall be apportioned among such policies as shall complete their distribution periods.

"That after the completion of the distribution period, provided this policy shall not have been previously terminated, this policy shall secure to the insured one of the following benefits:

"First. To apply the accumulated surplus apportioned by the company to this policy to the purchase of an annuity on the life of the insured to be used in reduction of subsequent premiums on this policy, and in case the amount accruing in any year from the annuity shall exceed the amount of premium due thereon, the excess to be paid in cash.

"Second. To continue the policy for the original amount and withdraw in cash the accumulated surplus apportioned by the company to this policy.

"Third. To withdraw in cash the entire equity (that is, the net reserve, being thirty-six hundred and seven dollars and twenty cents ($3,607.20) and in addition thereto the accumulated surplus aforesaid).

"Fourth. To convert the entire equity into a paid-up policy without participation in profits, for an amount to be determined by the method then in use by the company in determining paid-up policies of this class; provided that this policy is legally surrendered during the lifetime of the insured and within ninety days from the completion of the distribution period.

"Fifth. The conversion of the entire equity into a life annuity upon the life of and payable to the insured.

"Sixth. To continue the policy for the original amount and to convert the apportioned surplus into a reversionary addition conditioned upon satisfactory re-examination.

"These benefits are at the option of the insured."

The policy was delivered by mail, and the jury found by special verdict that inclosed with the policy, but not attached

thereto, was the following statement, marked Exhibit 2, and that it was the intention of the parties that such statement should be a part of the contract of insurance:

"STATEMENT.

Assets 115,000,000.00
Surplus 15,000,000.00
Annual Income 32,000,000.00

Illustrating Contract No. 454,346
of the
New York Life Insurance Company,
for
Mr. Mills Tourtellotte.
Age 38.
$10,000."

(Here follows a tabular statement, the first column of which enumerates the policy years from 1 to 20, the second and third columns show the total amount deposited and contain the company's guaranty to loan any or all of the premiums after the tenth year at the rate of six per cent. per annum. The fourth column shows the total amount of protection guaranteed in case of death, being $10,000 for each of the years from 1 to 10, inclusive, and from eleventh to twentieth, inclusive, increasing from $10,342 in the eleventh year to $13,420 in the twentieth year, or $342 each year. The fifth column shows the net profits for each year, assuming death occurred in that year, over amount invested. The sixth column guarantees a proportionate protection in case of discontinuance after three full annual deposits have been made.) The statement then continues:

"At the end of twenty years the contract guarantees (as expressed therein) an option to the holder between six different methods of settlement. The three principal of these methods are illustrated below; the figures there given are based on the results realized on tontine policies which have matured during the current year in this company.

"First option, cash value, $8,160.

"Second option, paid-up policy for $13,400.

"Third option, continue policy at original rate less annual dividends $10,000 and $4,553 in cash.

"Non-forfeitable, as per terms of contract after three full annual deposits have been made."

At the end of the distribution period plaintiff *Tourtellotte* exercised the third option mentioned in the policy, or the first in the statement accompanying the same, namely, to withdraw in cash the entire reserve and surplus value of the policy. Upon being informed by the company that the total cash value of his policy amounted to $5,889.60, the plaintiff *Tourtellotte,* under date of January 26, 1912, sent a letter to the defendant which contained, among other things, the following statements:

"I have from your branch office Milwaukee, letter of the 22d inst., advising me that the total cash value of said policy at maturity will be $5,889.60, which covers a dividend of $2,282.40 and the reserve of $3,607.20, and after deducting the amount of the note of $3,420 will leave a net of $2,469.60. This result is not in the least satisfactory and I protest against any such discharge of the obligation and I refuse to accept it.

"Accompanying the policy and in illustration of said contract No. 454,346 (given out and issued by authority of your company) is a written and printed guaranty which gives the cash surrender value thereof at maturity of $8,160, and after deducting the outstanding note of $3,420 leaves a net value of $4,740 which your representation showed and that I had a right to expect in cash at this time."

Then follows a statement showing what he had paid to the company, and the letter continues:

"This is too far short of what the results should be and what were represented they would be. The only logical conclusion is that a mistake has been made, in that I have not been credited with the earnings of the note feature of the contract. That the notes have been charged off against the cash earnings. Certainly if I am to be charged with the notes I should have credit for the earnings due to the loan feature thereof. The payment of the notes makes the whole trans-

action on a cash basis and the earnings must be figured as such. . . . So I say again that the net return of $2,469.60 is a mistake or I have been robbed of my just application of profits honestly applicable to my contract. There has been too little applied to the policy and too much gone to make up that many millions surplus we hear so much about.

"I am entitled to profits from lapses, guaranteed surplus and an honest division of earnings derived from the premiums both from the cash and note payments. Can you have those figures verified and see if there is not some mistake somewhere that justifies me in making this complaint? What I demand in the option available is the full cash surrender value, but I decline to settle for the sum named. It is not right, fair, or just."

In reply the company informed plaintiff *Tourtellotte* that the amount stated was correct, whereupon he brought this action against it claiming that the contract guaranteed the payment of the sum of $8,160. The defendant denied that the policy guaranteed the payment of $8,160 in any event, and alleged that the plaintiff *Tourtellotte* was entitled to receive as the cash value of said policy the entire equity (that is, the net reserve), expressly stipulated in the contract to be the sum of $3,607.20, and, in addition thereto, the accumulated reserve apportioned and distributed in accordance with the principles and method adopted by it to determine the amount equitably belonging to said policy, which amount was apportioned on the 28th day of February, 1912, and was the sum of $2,282.40, making in the aggregate the sum of $5,889.60.

The action was tried by a court and jury. A special verdict of two questions was submitted, as follows: (1) Was Exhibit 2 inclosed and delivered by the defendant to the plaintiff *Mills Tourtellotte* with Exhibit 1? Answered by the court, Yes. (2) Was it the intention of the parties at the time of the delivery of the policy that Exhibit 2 should constitute and be a part of the contract of insurance? Answer, Yes. (Exhibit 1 referred to above was the policy sued upon.) The plaintiff the *National Bank of La Crosse* held the policy

when it matured as collateral security to a loan made by it to the plaintiff *Tourtellotte.* The court entered judgment for the defendant notwithstanding the verdict, and the plaintiffs appealed.

*George H. Gordon,* for the appellants.

For the respondent there was a brief by *McConnell & Schweizer,* attorneys, and *James H. McIntosh,* of counsel, and oral argument by *Mr. C. H. Schweizer* and *Mr. McIntosh.*

VINJE, J. The question raised by the appeal is, Does the statement, Exhibit 2, treating it as a part of the contract of insurance, change the policy so as to make it guarantee or promise a cash value of $8,160 at maturity? The trial court held that it did not. Was such ruling correct? The statement purports to do nothing but illustrate or explain the contract. It contains no words of promise or guaranty. It does not even guarantee an option between the six different methods of settlement, for it says the contract (as expressed therein) does that. Then it proceeds to *illustrate* the three principal of these methods, and says expressly that the figures there given are based on the results realized on tontine policies of the company maturing the current year. There is not even an intimation or suggestion that the same results may be expected in the future. The only rational construction that can be given the statement, taken in connection with the policy, so far as the question at issue is concerned, is that it shows what the first option will be worth if the earnings of this policy equal that of tontine policies of the company maturing the current year. There is no claim that, based upon the results stated, such was not the value of the option. The language of the statement attached to the policy in the case of *Timlin v. Equitable L. Assur. Soc.* 141 Wis. 276, 124 N. W. 253, was quite different. It was held to contain words of promise as to the amount to be paid, while here we have language which purports only to illustrate the policy, and which states the source

of the figures upon which the illustration is based. For cases in which it has been held, under somewhat similar statements in connection with the policy, that there was no guaranty as to amount, see *Untermyer v. Mutual L. Ins. Co.* 128 App. Div. 615, 113 N. Y. Supp. 221; *Langdon v. Northwestern Mut. L. Ins. Co.* 199 N. Y. 188, 92 N. E. 440; *Grange v. Penn Mut. L. Ins. Co.* 235 Pa. St. 320, 84 Atl. 392.

That the plaintiff *Tourtellotte* understood his contract of insurance was one that, upon completion, entitled him to a guaranteed reserve of $3,607.20 and in addition thereto its equitable share in the surplus or profits, is quite evident from his letter to the company set out in the statement of facts. It is true he there refers to the statement in illustration of the contract, but that such reference was made for the purpose of emphasizing the inadequate result rather than as a claim for the specific amount of $8,160 is quite apparent from the concluding part of the letter, where he says: "I am entitled to profits from lapses, guaranteed surplus, and an honest division of earnings derived from the premiums both from the cash and note payments. Can you have those figures verified and see if there is not some mistake somewhere that justifies me in making this complaint?" If he had thought he was entitled to an absolute amount of $8,160 he would not have written thus. The claim that he was entitled to such sum and in addition thereto a share of the earnings is wholly untenable. The trial court correctly construed the contract of insurance.

*By the Court.*—Judgment affirmed.

FRANCIS H. LEGGETT & COMPANY, Respondent, vs. WEST SALEM CANNING COMPANY, Appellant.
SAME, Appellant, vs. SAME, Respondent.

*December 12, 1913—January 13, 1914.*

*Principal and agent: Acts in excess of authority: Disaffirmance: Contracts: When made: Preliminary negotiations: Sales.*

1. When an agent acts beyond or in excess of his authority, the principal will be bound by such act unless he disaffirms it within a reasonable time after knowledge thereof.
2. The evidence in this case is *held* insufficient to show disaffirmance by the defendant of the act of its agent in selling in forbidden territory.
3. Where a contract informal, but complete in its terms, appears to have been made, it will take effect and be binding notwithstanding the fact that the parties anticipate that a more formal contract will afterwards be made embodying the same terms.
4. But letters and telegrams between the parties will not be construed as a contract when it is plain that they were intended only as preliminary negotiations to be followed by a formal contract containing material provisions not contained in nor to be inferred from the preliminary letters or communications.
5. Where the terms of a contract are fixed and not ambiguous even proof of universal custom cannot change them.

APPEALS from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

Action for damages for breach of contract to sell and deliver 2,000 cases of canned peas known as "No. 4 Alaska peas" at eighty-five cents per dozen cans, there being two dozen cans in each case.

The defendant in June, 1911, operated a pea-canning factory at West Salem, Wisconsin, and the plaintiff was a wholesale grocery corporation at New York. The defendant at this time had an agent named Killian at New York who had the exclusive agency for the sale of its goods in New

York; H. C. Gilbert was a broker in canned goods at Indianapolis, under the name of H. C. Gilbert Company; and Johnston, North & Co. were brokers in canned goods at New York.

On June 10, 1911, Gilbert (who had previously sold one or two lots of canned peas for the defendant on commission) telegraphed to the defendant an offer to sell some of its canned goods in New York, and defendant replied that it had a broker in New York but that it had a "few futures left for your territory." June 13th Gilbert telegraphed, "Wire immediately list we can offer in our territory, we have one or two good prospects." June 14th defendant replied, "Have 2,000 cases four Alaska at ninety, usual freight allowance." June 15th Gilbert wired Johnston, North & Co. at New York, "We offer subject to goods being unsold 1,000 cases number four sweets, eighty cents, 2,000 cases fancy four Alaskas, eighty-five cents, f. o. b. Wisconsin," to which Johnston, North & Co. replied on the same day, "*Leggett* will take thousand four sweets, eighty, Muncie, 2,000 four Alaskas, eighty-five, West Salem, approval samples both, merely wants to be protected, wire answer." Also on the same day Gilbert telegraphed defendant, "Offered eighty-five f. o. b. for 2,000 fancy four Alaskas as per your wire fourteenth, also seventy-five f. o. b. for 2,000 sweets, wire answer," and to this the defendant replied on the 16th, "2,000 cases four Alaskas at eighty-five, f. o. b. factory, O. K." On the 16th also Gilbert telegraphed to Johnston, North & Co., "Confirm *Leggett* 2,000 cases fancy four Alaska, eighty-five cents, f. o. b. Salem." On June 15th Johnston, North & Co. wrote Gilbert the following letter:

"We have your wire offering 1,000 c-s No. 4 sweets at 80c f. o. b. Muncie and 2,000 c-s Fancy No. 4 Alaskas at 85c West Salem, Wis. Now Vallette of *F. H. Leggett & Co.'s* will take these two lots if we can show him samples of the goods or give him some kind of a contract that will cover him

on quality. As far as the No. 4 fancy Alaskas go, why this can be covered in the contract, for we all know what a fancy No. 4 Alaska Pea is, Wisconsin Pack, but as far as the 1,000 c-s No. 4 Sweets, Indiana, it is pretty hard to describe the quality to a buyer and protect him. See if you can tie these two lots up and advise us by wire."

On June 17th Gilbert wrote and sent to defendant the following letter which in the ordinary course of mail would reach West Salem on the 19th or early on the 20th of June, viz.:

"Referring to the 2,000 c-s Fancy No. 4 Alaska Peas you have confirmed to me, after confirming this to the buyer, it occurred to me that you wired me a few days ago that you had a broker in New York and I understood from this that you did not wish me to offer your peas in that city. I had already confirmed these to *Francis H. Leggett & Company* before it occurred to me, and I hope under the circumstances it will be agreeable to you to accept a contract made out to *Francis H. Leggett & Company,* New York. If, however, you are afraid this will get you into trouble, I will have the contracts made out to myself and then of course I can sell them to *Leggett* without interfering with your New York representative.

"Along this line, I would suggest that this question comes up very often with me in selling goods for packers. The most of the packers take the position that their local representatives should not complain if I go into their markets and sell canned goods for them. In other words, the local representative is presumed to be looking after the interests of said packer, and if he were doing this work conscientiously, any broker from an outside market could not get in there and sell his trade. I do not think any local broker has a right to complaint when I go into his market and sell goods for a packer he represents direct because, as I have said before, if he were looking after your interests there, he would get the business instead of me getting it for you. Please let me hear from you on this subject, and oblige."

This letter was not specifically replied to by defendant, unless a telegram and letter sent by defendant to Gilbert on

June 21st may be considered as replies. The telegram and letter referred to read respectively as follows: "The extremely hot weather has cut the crop short in this section and we are now sold up to the limit." After this telegram was received and on June 22d, Gilbert wrote defendant the following letter:

"Your telegram of the 21st received saying that you could not take on any more business for future peas. We inclose the contract for 2,000 cases No. 4 fancy Alaskas sold for you on the 16th. This contract has just gotten back signed by the buyer. Please sign the blue copy and return retaining the yellow copy for your files. Now, these people are shipping their labels but before you put the labels on the peas, they want you to send them a dozen cans of your peas so they can see just what the quality is. In other words, they want to determine whether the labels they are sending to you are the ones they want put on these peas or whether they will want to have them under another label. Just as soon as you can send them a dozen cans that will represent the peas that you will ship on this contract, ship the samples by express to Johnston, North & Co., New York, and mark them for *Francis H. Leggett & Co.,* and our associate brokers there will advise us in regard to the labels."

This letter was never replied to. On July 1st the defendant's office, with all of its correspondence, was consumed by fire. On July 3d Gilbert wrote reminding the defendant that it had not signed and returned the *Leggett* contract, also on July 7th, 12th, and 14th. To the last named letter the defendant replied as follows:

"We have had a fire that burned our office and we are trying to straighten things. We have not the contract you refer to if we have had it must burned. However, we will have our bookkeeper look the rest of our papers through, but do not think we have any contracts not signed for parties. We are nearly through with pack, will be able to fill our orders."

To this letter Gilbert replied on July 15th, inclosing a second copy of the contract for signature and requesting the

forwarding of samples. On July 17th the defendant replied to this letter as follows:

"We have your letter of the 15th with contracts inclosed, which we herewith return as we are unable to fill it on account of the short crop. We are sorry that we cannot fill this contract, but under the unfavorable condition of the weather it is impossible to fill any more contracts. We assure you that if we have anything left after filling our futures we will notify you and give you a chance."

Other correspondence followed in which Gilbert still claimed that a valid contract existed, and on July 31st the defendant sent to Gilbert the following letter:

"We have your letters referred to in your letter of the 26th inst. We do not consider ourselves under contract with *Francis H. Leggett & Co.* We have a copy of your telegram on June 12th and our reply on the 16th simply stating what we had and at what prices. We have accepted no order nor have we signed any contract with these people, but, however, if it is possible for us to accommodate you on this order later in the season, we will be pleased to do so. The writer is familiar with all this transaction and the laws binding thereon. We are not trying to shirk any contracts that we have made, nor do we propose to sign contract unless we can see our way clear to do so."

The circuit court ruled that the telegrams of June 15th and 16th constituted a contract for the sale of 2,000 cases of Alaska peas at eighty-five cents, and the only question for the jury was the question of damages. In response to special questions the jury found that the market value of "fancy four Alaska peas" per dozen cans at West Salem, June 21, 1911, was eighty-five cents, on July 17th $1, and on August 1st $1.20.

Upon this verdict the court rendered judgment for the plaintiff for $600 with interest, being the difference between the market value of the peas on June 21st and on July 17th. The defendant appeals from the whole judgment, and the plaintiff appeals from that part thereof which limits the re-

covery of damages to the difference in market price which existed July 17th, instead of the difference which existed on August 1st.

For the plaintiff there was a brief by *Bunge & Bosshard,* and oral argument by *George W. Bunge.*

*J. E. Higbee,* for the defendant.

WINSLOW, C. J. Clearly Gilbert was the agent of both parties, as middlemen generally are and properly may be. His function was simply to act as the means of communication between parties who made their own terms. *Stewart v. Mather,* 32 Wis. 344, 355; *Orton v. Scofield,* 61 Wis. 382, 21 N. W. 261. Probably no one would doubt that if the only facts appearing in evidence were that the plaintiff sent to the defendant a telegram offering eighty-five cents per dozen, f. o. b., for 2,000 cases fancy four Alaska peas, and that the defendant replied immediately, "$2,000 cases four Alaskas at eighty-five, f. o. b. factory, O. K.," there would have resulted a complete contract, which could be sued on by either party in case of breach.

At first glance this seems to be what was done here by the telegrams which were exchanged on June 15th and 16th between Johnston, North & Co., Gilbert, and the defendant. The defendant contends, however, that there are additional facts in the evidence which demonstrate that no binding contract was made or intended to be made by the telegrams. These additional facts are in brief (1) that the defendant never authorized Gilbert to sell any goods to a New York purchaser; (2) that the plaintiff authorized Gilbert to make no contract except a contract which contained a provision requiring the furnishing of samples; and (3) that it was contemplated by the parties that a formal written contract containing additional and materially different provisions should be signed by the parties later.

As to the first contention, it is shown that as early as

June 19th or 20th the defendant was fully informed that the sale had been in fact made to New York parties, and it is just as certain that the defendant never repudiated the sale on that account.

Where an agent acts beyond or in excess of his authority it becomes the duty of the principal to disaffirm the agent's act within a reasonable time after knowledge thereof or he will be bound thereby. *McWhinne v. Martin,* 77 Wis. 182, 46 N. W. 118; *Clews v. Jamieson,* 182 U. S. 461, 21 Sup. Ct. 845. The telegram and letter of June 21st are simply statements that the defendant can take no more contracts; they contain no hint that any contract already entered into is rescinded, or that Gilbert's act in selling to New York parties is repudiated. Even as late as July 17th the defendant writes Gilbert returning the proposed written contract simply because "we are unable to fill it on account of the short crop," and assures him that "if we have anything left after filling our futures we will notify you and give you a chance." It is true that in the letter of July 31st the defendant says that "we do not consider ourselves under contract with *Francis H. Leggett & Co.,*" but even here no claim is made that the contract was void because made with New York parties, but simply that "we have *accepted no order*" and signed no contract. In this last letter it seems very evident that the defendant's officers did not have before them Gilbert's telegraphic offer of June 15th and the unconditional acceptance thereof dated June 16th, as they refer only to "your telegram on June 12th and our reply on the 16th simply stating what we had and at what prices."

We reach the conclusion that the defendant did not disaffirm the contract within a reasonable time after the fact that their agent had entered forbidden territory was brought to their attention, and hence that the defendant's first contention fails.

The second and third contentions are very closely related and present more serious questions.

As to the furnishing of samples, it is admitted by plaintiff that Johnston, North & Co.'s telegram to Gilbert of June 15th authorized only a purchase conditioned on the approval of samples to be furnished by the seller, but it is said that this requirement was waived by the letter of the same date passing between the parties. This letter will be found quoted at length in the statement of the case and need not be repeated here. Its meaning is not so clear as might be desired, but if it be construed as waiving the furnishing of samples, that waiver is only to take place in case some clause guaranteeing the quality is inserted in the contract. The subsequent correspondence between Johnston, North & Co. and Gilbert (which it has not been thought necessary to print) shows beyond dispute that the plaintiff, Johnston, North & Co., and Gilbert expected that samples would be furnished in order that the plaintiff might judge of the quality. That this was Gilbert's idea is very clearly evidenced by his letter to the defendant of June 22d, which is quoted at length in the statement, and by a number of letters which followed it. So it seems certain that neither the plaintiff nor Gilbert understood that the demand for samples had been waived or made unnecessary by anything to be contained in the proposed written contract. This brings us naturally to the third contention. The law is quite well settled that where a contract informal, but complete in its terms, appears to have been made, it will take effect and be binding notwithstanding the fact that the parties anticipate that a more formal contract will be afterwards made embodying the terms of the informal contract. *Cohn v. Plumer,* 88 Wis. 622, 60 N. W. 1000.

It is equally well settled, however, that letters or telegraphic communications between the parties will not be con-

strued as a contract when it is plain that they were intended only as preliminary negotiations to be followed by a formal contract containing material provisions not contained in or to be inferred from the preliminary letters or communications. *Lyman v. Robinson,* 14 Allen, 242, 254; *Moulton v. Kershaw,* 59 Wis. 316, 18 N. W. 172; *Hunter v. Hathaway,* 108 Wis. 620, 84 N. W. 996.

In the first case above cited it is said: "The question in such cases always is, Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound?"

The evidence in the present case makes it entirely certain that both the parties to the transaction and the brokers expected that a formal written contract would be executed by the parties embodying in detail the terms of the sale. If this written contract was expected to be simply a more formal document embodying only the terms expressly stated or necessarily implied in the telegrams, the fact that it was expected to be made might not be considered important, but the evidence conclusively shows that it was expected to contain terms not contained in or to be implied from the telegraphic communications. Even if we were to ignore the fact that the plaintiff from start to finish insisted on the furnishing of samples or the embodiment of some clause guaranteeing quality in the contract, the evidence makes it clear that there was another material provision not contained in nor to be implied from the telegraphic messages which all parties expected would be included in the written contract, namely, the provision that in case of a short crop, fire, or other unavoidable accident the defendant would only be obliged to deliver seventy-five per cent. of the contract amount.

The evidence on the part of the defendant is undisputed that it never sold peas without a written contract, that it al-

ways embodied this clause in its written contracts, and that this was the universal custom among packers, brokers, and buyers of canned goods. It is certain that the broker, Gilbert, expected the written contract to contain this provision, because he inserted it in the contracts which he drew and sent to the parties for signature, as appears from his letter of July 18th. It appears also that the plaintiff entertained a like expectation, for it immediately signed and returned the contract which Gilbert forwarded to it on June 17th containing the seventy-five per cent. clause.

If the telegrams constituted a contract there could be no such allowance, because they call for the delivery of 2,000 cases absolutely, and where the terms of a contract are fixed and not ambiguous even proof of universal custom cannot change them. *Mowatt v. Wilkinson,* 110 Wis. 176, 85 N. W. 661.

These considerations seem to conclusively negative the idea that the telegrams were expected by either party to constitute the contract between them, but were simply regarded as the preliminary steps, to be followed by the furnishing of samples and the execution of a written contract by which only the rights of the parties were to be fixed. That contract never having been executed, the present action must fail.

*By the Court.*—Judgment reversed on the defendant's appeal, and action remanded with directions to enter judgment dismissing the complaint. The plaintiff takes nothing on its appeal. But one bill of costs is allowed.

ADLINGTON, Respondent, vs. CITY OF VIROQUA, Respondent, and others, Appellants.

*December 12, 1913—January 13, 1914.*

*Appeal: Verdict, when conclusive: Injury from defective sidewalk: Duty and liability of abutting owners: Discharge of water upon walk: Negligence: Duty to keep walks in repair: Landlord and tenant: Excessive damages.*

1. Where the evidence is conflicting the verdict of a jury, confirmed by the trial court, is conclusive; and when the trial court fairly decides that there is a conflict in the evidence the determination is well nigh as conclusive as a verdict where a conflict of evidence is conceded.
2. It is the duty of a city to maintain its sidewalks in a suitable condition for public travel; but it is the duty of the abutting owners to act reasonably to prevent and remedy a condition rendering the walk unsuitable for use.
3. If an abutting owner by his own fault renders a sidewalk defective, he is liable for a resulting injury regardless of the concurrent liability of the city.
4. Ordinary care for the safety of others is not consistent with such conduct as that of a person accumulating into a body the water falling upon his premises and discharging the same in such a manner that the natural and probable result will be to render the premises receiving the flow unsuitable for their ordinary use.
5. Where the owners of a building discharged water from the roof thereof through a conductor pipe into an alley near a sidewalk, and a culvert under the walk, designed to afford a channel for such water, had been obstructed for some time, so that as a natural and probable consequence the water flowed upon the walk, causing ice to form thereon and render the walk unsafe, a jury was warranted in finding that said owners acted unreasonably and hence negligently in thus discharging the water, even if it be conceded that it was the duty of the city to keep the culvert clear. *Hausmann v. Madison*, 85 Wis. 187, distinguished.
6. But, under sub. 7, sec. 925—205, Stats., imposing upon abutting lotowners the duty of keeping sidewalks in repair, it was the duty of the owners of the premises, primarily, to repair the obstructed condition of the culvert.
7. The duty to repair being imposed upon the owners, the fault which rendered the manner of discharging the water from the

**premises unreasonable and negligent was the fault of the owners, even though the premises were at the time occupied by a tenant, especially since the conditions in question existed long before the premises were leased.**

**8. Where a married woman, fifty-five years of age, sustained serious injuries by reason of a fall on an icy sidewalk and, though no bones were broken, suffered much pain, was unable to go outdoors for some months, could not for nearly a year go about as usual, and was likely always to suffer some sense of weakness and infirmity from the injury, an award of $1,500, though large, was not clearly excessive.**

APPEAL from a judgment of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to recover for a personal injury alleged to have been caused by the unsafe condition of a sidewalk.

The sidewalk was alleged to be in front of property owned by *Henry Lindeman, William T. Lindeman, Regina Trowbridge,* and Albon Lindeman. The accident occurred during the lifetime of the latter. The action was commenced against the city after his decease. *Henry Lindeman* and *Edith Lindeman,* in due course, were appointed administrators of his estate. Under the charter provision of the city, sec. 1340*a,* Stats., making the owners of abutting property primarily liable in certain cases, they were brought in as defendants—Albon Lindeman by his personal representatives. The accident occurred December 9, 1910. The alleged difficulty with the walk consisted of its being in an uneven and slippery condition because the water, precipitated upon a large building on the particular property, was conveyed therefrom by a pipe and deposited in a private alley on the premises near the walk, so as to flow down the same to and onto such walk and accumulate thereon sufficiently to create the unsafe condition in cold weather. There was a culvert designed to afford a channel for the water under the walk; but it had been obstructed and useless for a considerable length of time. In passing over the walk at this point, plaintiff was alleged to have fallen be-

cause of its rough and slippery condition produced by the aforesaid circumstances. She was alleged to have received severe bodily injuries.

The issues were thus specially decided: Plaintiff was injured by falling on the sidewalk at the time and place alleged in the complaint. The walk was defective by reason of an accumulation of ice thereon. Such accumulation was formed from water discharged near the walk by way of a conveyor pipe leading to and taking water from the building in question. Ordinary care was not exercised in respect to the pipe and gutter and the culvert leading therefrom. Such fault was the proximate cause of plaintiff's injury. Had the officers of the city of *Viroqua* exercised ordinary care, they would have discovered the unsuitable condition of the walk in time to have remedied it. The condition of the walk had been continuous for three weeks prior to the accident. There was no want of ordinary care on plaintiff's part which contributed to produce her injury. She was damaged to the extent of $1,500. Judgment was rendered on the verdict in plaintiff's favor. The defendants, other than the city, appealed.

For the appellants there was a brief by *Bunge & Bosshard,* and oral argument by *George W. Bunge.*

*C. W. Graves,* attorney, and *J. Henry Bennett,* of counsel, for the respondent *Adlington.*

*H. P. Proctor,* for the respondent *City of Viroqua.*

MARSHALL, J. The points argued in appellants' brief which are not discussed in this opinion, must be regarded as not involving any proposition of sufficient moment to warrant opinion treatment. It is quite useless to urge upon the attention of this court as ground for disturbing a judgment, that the jury came to a wrong conclusion as to matters involved in conflicting evidence. Where there is evidence on one side and evidence, direct or circumstantial, on the

other, which from any viewpoint a jury could reasonably believe, the result, confirmed by the trial judge, is conclusive. That doctrine is older than this court. It cannot be too well appreciated. It should be remembered that the rule cannot be overcome by mere argument that there is no conflict in the evidence. When the trial court fairly decides that there is a conflict, warranting jury interference, the determination is well nigh as conclusive as a verdict where a conflict of evidence is conceded. *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Bohn v. Racine,* 119 Wis. 341, 96 N. W. 813; *McCune v. Badger,* 126 Wis. 186, 105 N. W. 667; *Slam v. Lake Superior T. & T. R. Co.* 152 Wis. 426, 140 N. W. 30.

Before it can be said that the evidence does not present a case of conflict, we must conclude that the trial judge was clearly wrong on the preliminary matter after giving due weight, in favor of the initial decision, to all the advantages below. That obviously calls for a case so strong as to leave little or no good ground to differ in respect to it. Here the trial judge was challenged, again and again, on the subject of whether there was a conflict of evidence affording room for a decision in either of two ways. The decision first given was likewise affirmed. If that must stand, and we are unable to see any commanding reason why not, the verdict must necessarily prevail as regards the right of the conflict.

It is contended that the facts, as found by the jury and established by evidence, do not indicate any violation of duty on defendants' part. That is predicated on the theory that the culvert under the sidewalk was properly constructed and that its defective condition was not the fault of appellants nor of any one for whose acts they were responsible.

By reference to numerous cases, it is conceded that, if one discharges water through a spout directly onto a sidewalk causing ice to form thereon so as to render the way defective, he is guilty of actionable negligence. That concession ac-

cords with well settled principles and is quite enough for this case. True the facts here are somewhat different from those in any of the adjudications cited to our attention; but the principle does not spring from the facts. The facts render the principle applicable. The principle is that ordinary care for the safety of others is not consistent with such conduct as that of a person accumulating water falling upon his premises into a body and discharging the same so as to, naturally and probably, result in rendering the premises receiving the flow in the artificial way, unsuitable for their ordinary use. He may divert surface water from flowing onto his land, or change the surface so as to cause water falling or coming thereon from higher lands to flow therefrom, accumulated into a stream, so long as he acts with reasonable regard for the effect upon the lower premises. That is the doctrine of the common law which has been fully adopted in this state. *Shaw v. Ward,* 131 Wis. 646, 111 N. W. 671, except in so far as modified in *Pettigrew v. Evansville,* 25 Wis. 223.

The fact that accumulated water is not discharged directly on the lower premises but is released near by and reaches such premises with substantially the same effect as if discharged thereon, makes no difference. *Pettigrew v. Evansville, supra.* So here the fact that the water was discharged from defendants' conveyor pipe a few feet from the edge of the sidewalk, is of little consequence, so long as the natural and probable result was that it would reach the sidewalk with substantially the same consequences as if discharged at or on the walk. It will be observed that when one artificially causes the surface water falling upon his premises to flow therefrom, collected into a stream, he may or may not be liable for the injurious consequences according to circumstances. The maxim that there is reason in all things, applies. He cannot legally act regardless of re-

sults of a serious character to others, especially if such results could be, reasonably, avoided.

In view of the foregoing, it was a fair question for the jury as to whether appellants did not act unreasonably and, so, negligently, in discharging the water from their conveyor pipe in such a manner as to render, natural and probable, an unsafe condition of the sidewalk where that could have been avoided without any great inconvenience by keeping clear the conduit under the walk. True, it was the business of the city to maintain its sidewalk in a suitable condition for public travel; but it was the duty of the abutting owners to act reasonably to prevent and remedy a condition rendering the walk unsuitable for use. With the duty to act reasonably in ridding the premises of surface water, and duty as regards the safety of the walk, there was evidence to carry the question of negligent breach to the jury.

It is no sufficient answer to say that the culvert made the walk safe, in general, and that it was the obstructed condition, for which appellants were not at fault, which rendered the water discharged from their conveyor pipe liable to render the walk unsafe. The obstruction had existed so long, appellants must have known of it, as the jury had a right to believe. With such knowledge they continued to discharge the surface water from their premises in a manner which they knew, or ought to have known, as the jury had a right to believe, would cause an unsafe condition of the sidewalk, although such consequences could have been prevented, as the jury might reasonably have thought, by keeping the culvert clear.

We do not overlook *Hausmann v. Madison,* 85 Wis. 187, 55 N. W. 167, upon which counsel for appellants confidently rely, but the principle thereof does not seem to have any efficient bearing on this case. It applies only to the usual condition of slipperiness of sidewalks in winter, caused by

such natural and almost unpreventable occurrence as water dripping from buildings thereon and freezing. Such a situation is quite remote from one where the owner of premises gathers the water falling thereon into a channel and discharges the same at a point where he knows, under the circumstances, or ought to know, an unsafe condition of the adjacent sidewalk will result, and makes no effort to remedy the particular situation rendering his act perilous to public safety.

It is said that it was the duty of the city, not of the abutting owners, to clear out the culvert. If that be conceded, it would count for very little under the circumstances. The liability of the culvert to become useless was well known to appellants. The fact that it was useless at the time in question and had been for a long time, was well known to them, as the jury found. Except for the artificial condition created by them, the walk was not defective, even when the culvert was closed. Therefore, it may well be said they created the defect. They deposited water from their premises near the walk knowing, as the jury found, that a nuisance would result rendering the walk unsuitable for public use. It is a familiar principle that, if an abutting owner by his own fault renders a sidewalk defective, he is liable regardless of the concurrent liability of the city. Such is the effect of the statute.

But is it true that it was the duty of the city to keep the culvert in a suitable condition as regards repairs? It may well be admitted that appellants would not be responsible for a defect in the original construction of the walk, that, however, not militating against liability in case of the defective construction creating a known condition which made their act of depositing the water from their premises, as they did, unreasonable, and the result the creation of a nuisance. But the statute expressly imposes upon abutting lotowners the duty of keeping sidewalks in front of their premises in a

proper state of repair. Sub. 7, sec. 925—205, Stats. That, of itself, would not render an abutter liable for damages in case of an accident happening by reason of the sidewalk being defective for want of repairs. *Hay v. Baraboo,* 127 Wis. 1, 105 N. W. 654. However, the obstructed condition of the culvert called for repairs. It was the duty of appellants, primarily, to remedy that infirmity. They knew, or ought to have known, that unless remedied the accumulation of water deposited near the walk from their conveyor pipe would create a nuisance by rendering the walk unsafe. The mere want of repair of the culvert would not have rendered the walk unsafe. It was the discharge of the large quantity of water from the conveyor pipe which did the mischief, under the circumstances. So the argument that it was not the duty of appellants to repair the culvert, is unsound, and the argument that, if it was their duty, failure to perform it, within the principles of *Hay v. Baraboo, supra,* does not affect their liability, is likewise unsound.

The point is made that the premises were leased to a corporation and occupied by it at the time of the accident and that it was the negligence of the tenant rather than that of appellants in leaving the culvert in a useless condition. Counsel overlook the fact that the duty to repair is imposed on the owner. Therefore the fault which rendered the manner of discharging the water from appellants' premises unreasonable and negligent, was their own. They were at fault as regards the culvert not being repaired and as regards the manner in which the water from their premises reached the sidewalk. The conditions, in that regard, existed long before they leased the premises, as satisfactorily appears from the evidence.

The further point is made that the damages awarded are excessive. That is merely suggested to our attention without argument. The evidence indicates that respondent was a married woman fifty-five years of age, when injured; that,

though no bones were broken, her injuries were quite serious; that she suffered much pain, was unable to go about outdoors for some months; that it was well near a year before she could go about, at all, as usual, and that she will be quite likely to always suffer some sense of weakness and infirmity from her injury. True, since she could not recover for impaired working ability, the amount assessed by the jury seems quite large; but not so large that it clearly appears to be excessive.

*By the Court.*—The judgment is affirmed.

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FUGINA, Respondent, vs. NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Appellant.

*December 12, 1913—January 13, 1914.*

*Life insurance: Payment of premiums after due: Waiver of strict performance and of forfeiture: Reinstatement, when unnecessary.*

1. Where, during the last two and one-half years before the death of the insured, all the quarterly premiums on a life insurance policy except the last one were paid by the insured and received by the company, without penalty, at times ranging from 75 to 118 days after they were due, and such course of dealing had induced the insured to believe that strict performance of the terms of the policy had been waived and that payment of defaulted premiums would be received within a reasonable time after default on the understanding that the contract had not lapsed, the failure to pay the last premium, which fell due 33 days before his death, did not result in a forfeiture or lapse of the policy, since the company must be held, under such circumstances, to have waived the provision in the policy for strict performance as to payment of premiums when due and forfeiture for nonpayment.
2. There having been no forfeiture in such case, no reinstatement of the insured as provided in the policy was necessary.

APPEAL from a judgment of the circuit court for Trempealeau county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This action was brought to recover under a life insurance policy issued by the defendant. The contract of insurance sued upon was made by the husband of respondent, and appellant, May 27, 1901. The respondent, as wife of the insured, was named as beneficiary in the policy. The policy was issued subject to certain conditions, among which were:

"I. *Payment of premiums.* All premiums are due and payable at the home office of the company, but may be paid to agents producing receipts signed by the president or secretary and countersigned by such agents; and the nonpayment of any premiums when due, shall forfeit all premiums paid on this policy and terminate the liability of the company thereunder, except as hereinafter provided."

"VII. *Reinstatement of policy.* This policy may be reinstated during the life of the insured at any time within twelve months of the date of lapse by the payment of all past-due premiums and a fine of ten per cent. per annum on such overdue premiums."

"*Notice.* That each and every payment of premium is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice is hereby expressly waived. The giving of any other notice or the acceptance of any premium after it is due is to be considered as an act of courtesy only, and shall not be deemed as establishing a custom or as waiving or disturbing any of the conditions as to payments of premiums thereafter due."

The jury returned the following verdict:

"(1) Was the course of dealing on the part of the defendant company with the insured, Emil C. Fugina, in respect to this policy, such as induced the said Emil C. Fugina to believe that the strict performance of the terms of the policy had been waived, and that payment of defaulted premiums would be received within a reasonable time after default on the understanding that the contract had not lapsed, and that

such modified performance would be accepted by the company in lieu of the obligations imposed by its strict terms? *A.* Yes.

"(2) If you answer the foregoing 'Yes,' then was the failure of the said Emil C. Fugina to pay the premiums which fell due February 1, 1906, induced by such course of dealing on the part of the defendant company? *A.* Yes.

"(3) If you answer question No. 1 'Yes,' then was the failure to pay said premium which fell due February 1, 1906, continued for an unreasonable time after said premium fell due, before the time of his death? *A.* No."

Judgment was entered for plaintiff on the verdict and the defendant appealed.

*George H. Gordon,* for the appellant.

*Frank C. Richmond* and *Frank Winter,* for respondent.

KERWIN, J. The assignments of errors raise the question whether a verdict should have been directed for defendant. It appears that the premium due February 1, 1906, was never paid, and that the insured died March 5, 1906, and notice of his death received by the defendant March 21, 1906.

The contention of the appellant is that the policy lapsed because of failure to pay the premium which fell due February 1, 1906, and that insured was never reinstated. Many cases from other jurisdictions are cited by appellant on this point, and there would be great force in the argument if the alleged lapse or forfeiture had in fact occurred.

We think the findings are well supported by the evidence. This being so, the question arises whether they support the judgment. The inquiry is whether the policy lapsed, or whether the course of dealing between the parties was such as to amount to a waiver of the provisions of the policy as to payment of premiums when due. It will be seen from an examination of the record that none of the premiums under the policy, after and including the one due August 1, 1903, were paid when due. From that date up to the time

of death the deceased paid and the defendant received the quarterly premium in each case long after the same became due. The first of such payments was made 82 days, the second 83 days, the third 78 days, the fourth 118 days, the fifth 107 days, the sixth 94 days, the seventh 87 days, the eighth 91 days, the ninth 75 days, and the tenth 80 days after due. So it will be seen that if there was no waiver of the forfeiture clause the deceased was insured during the last two and a half years for which he paid premiums only about two months. No notice of lapse or reinstatement of the policy was produced on the trial, but receipts for premiums paid were produced. The evidence shows that no penalty was paid for nonpayment of premium when due as provided in the policy. We think it clear under the findings and the evidence that the provision as to lapse of the policy for nonpayment of premiums was waived and therefore there was no lapse or forfeiture.

The jury found upon sufficient evidence that the course of dealing was such as to induce insured to believe that strict performance of the terms of the policy had been waived, and that payment of defaulted premiums would be received within a reasonable time after death of deceased, and that the insured believed and had reason to believe that such waiver had in fact been made, and that failure to pay the premium which fell due February 1, 1906, was not continued an unreasonable time, and that the failure to pay the premium was induced by the course of dealing on the part of the defendant. Upon the findings of the jury and the evidence we think it clearly established that the defendant intended to waive and did waive the provision in the policy for strict performance as to payment of premiums when due and forfeiture for nonpayment. All the premiums after and including that falling due August 1, 1903, except the last, were received by the defendant at periods ranging from 75 to 118 days after due.

We think this case is ruled by the following decisions in this court: *Knoebel v. North Am. Acc. Ins. Co.* 135 Wis. 424, 115 N. W. 1094; *Alexander v. Continental Ins. Co.* 67 Wis. 422, 30 N. W. 727; *Stylow v. Wis. O. F. M. L. Ins. Co.* 69 Wis. 224, 34 N. W. 151; *Reisz v. Supreme Council A. L. of H.* 103 Wis. 427, 79 N. W. 430; *Seidel v. Equitable L. A. Soc.* 138 Wis. 66, 119 N. W. 818; *Ramsey v. Travelers' P. Asso.* 147 Wis. 405, 133 N. W. 634.

If any authority outside of this state were necessary, the cases of *Morgan v. Northwestern N. L. Ins. Co.* 42 Wash. 10, 84 Pac. 412, and *Hartford L. & A. Ins. Co. v. Unsell,* 144 U. S. 439, 12 Sup. Ct. 671, are in point in favor of respondent's position here.

Counsel for appellant lays great stress on the point that the policy provides that reinstatement must be made during the life of the insured, hence there can be no reinstatement after death. This proposition would be difficult to meet if there had been in fact a forfeiture. But upon the established facts there had been no forfeiture, because that provision of the policy had been waived by the course of dealings of the parties.

In *Reisz v. Supreme Council A. L. of H.* 103 Wis. 427, 79 N. W. 430, the insured died while in default, and the court held that, because the company constantly received payments when overdue, the insured might reasonably infer that he was to be accorded a reasonable credit on his assessments. The court said:

"In line with such general policy, the rule has become well established by authority that where, by failure of some exact performance, a forfeiture is imposed on one party by the strict terms of an agreement, conduct of the other sufficient to induce a belief that such strict performance is not insisted on, but that a modified performance is satisfactory and will be accepted as equivalent, will justify a conclusion that the parties have assented to a modification of the original terms, and that their minds have met upon the new un-

derstanding that a different mode of performance shall have the same effect—or, as it is often expressed, that the obligee has waived strict performance."

Many cases are cited by appellant's counsel from other jurisdictions, but we regard the questions involved here settled by the decisions of this court. Counsel seems to rely on *Toelle v. Central Verein,* 97 Wis. 322, 72 N. W. 630, but we do not regard that case in point.

We are convinced that the judgment below is right and should be affirmed.

*By the Court.*—The judgment is affirmed.

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BRUHNKE, by guardian *ad litem,* Appellant, vs. CITY OF LA CROSSE, Respondent.

*December 12, 1913—January 13, 1914.*

*Municipal corporations: Street cleaning: Negligence of driver of dump wagon: Injury to child: Liability: Attractive nuisance.*

1. The care and maintenance of the highways in a city is a governmental duty; and the city is not liable *respondeat superior* for negligence of an employee or licensee in operating a city dump wagon which is being used for street-cleaning purposes.
2. The mere fact that a dump wagon owned and operated by a city for street-cleaning purposes was attractive to children would not make its use on the streets unlawful or its presence a nuisance. The city is not liable, therefore, for injuries to a child who followed the wagon and, just as the driver dumped the load, came in contact with the chains constituting a part of the dumping device. *Kelly v. Southern Wis. R. Co.* 152 Wis. 328, distinguished.

APPEAL from an order of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a general demurrer to the complaint.

For the appellant the cause was submitted on the brief of *James Thompson.* He contended, *inter alia,* that the claim, being for injuries sustained by reason of a defect in defendant's property which the defendant knew or ought to have known was inherently dangerous, particularly to small children likely to come in contact with it, pertains to defendant's proprietary functions and not to its governmental functions. *Morrison v. Eau Claire,* 115 Wis. 538, 544, 545, 92 N. W. 280. In the care and management of their property municipal corporations, like individuals, are in duty bound to produce no injury to others. Cooley, Torts (2d ed.) 738, 739; *Rowland v. Superintendent of Poor,* 49 Mich. 553, 14 N. W. 494; 20 Am. & Eng. Ency. of Law (2d ed.) 1205; 28 Cyc. 1307; 4 Dillon, Mun. Corp. (5th ed.) § 1671; *Little v. Madison,* 42 Wis. 643; *Rochester W. L. Co. v. Rochester,* 3 N. Y. 463; *Libby v. Portland,* 105 Me. 370, 74 Atl. 805, 26 L. R. A. N. S. 141; *Fox v. Philadelphia,* 208 Pa. St. 127, 57 Atl. 356, 65 L. R. A. 214; *Todd v. Crete,* 79 Neb. 671, 113 N. W. 172; *Pass Christian v. Fernandez,* 100 Miss. 76, 56 South. 329, 39 L. R. A. N. S. 649; *Roman v. Leavenworth* (Kan.) 133 Pac. 551; *Kennedy v. New York,* 73 N. Y. 365; *Stephani v. Manitowoc,* 89 Wis. 467, 62 N. W. 176; *Mulcairns v. Janesville,* 67 Wis. 24, 32, 33, 29 N. W. 565; *Fink v. Des Moines,* 115 Iowa, 641, 89 N. W. 28.

*A. H. Schubert,* for the respondent.

TIMLIN, J. The gravamen of the complaint is that the city owned and operated certain dump wagons so constructed as to be attractive to children, and dangerous to the children so attracted while the wagon was being dumped. That on April 19, 1912, the city was operating one of these wagons filled with earth and refuse, and the infant plaintiff, five years of age, followed this wagon and came in contact with the chains forming constituent parts of the dumping device, just as one of the employees of the city in charge of the

wagon, without notice or warning to the plaintiff, negligently disengaged the dumping device, causing the chains moved by such disengagement to move and draw the infant into or against the pulleys through which these chains passed, with great force, seriously injuring the infant. It is not averred that this employee knew or ought to have known of the presence or proximity of the infant.

A second cause of action is attempted to be set forth in all respects similar to the foregoing except that the person called an employee of the city in the first is called a licensee of the city in the second. The complaint fails to set forth any facts tending to show that the defendant city was operating these wagons in its proprietary capacity, and it is assumed by both counsel that the wagons were used for street-cleaning purposes by the city, and on this ground the learned circuit court sustained the demurrer, holding that this was a public governmental duty imposed by law upon the city, and hence the latter was not liable *respondeat superior,* citing *Hayes v. Oshkosh,* 33 Wis. 314; *Manske v. Milwaukee,* 123 Wis. 172, 101 N. W. 377; *Higgins v. Superior,* 134 Wis. 264, 114 N. W. 490; *Kuehn v. Milwaukee,* 92 Wis. 263, 65 N. W. 1030; *Haley v. Boston,* 191 Mass. 291, 77 N. E. 888, 5 L. R. A. N. S. 1005.

The learned counsel for the appellant invokes the rule of the *Turntable Cases,* so called, and annexes to this the rule that a municipal corporation cannot, without incurring liability therefor, operate and maintain a nuisance, citing *Harper v. Milwaukee,* 30 Wis. 365; *Winchell v. Waukesha,* 110 Wis. 101, 85 N. W. 668; 20 Am. & Eng. Ency. of Law (2d ed.) 1209; *Little v. Madison,* 42 Wis. 643; *Stephani v. Manitowoc,* 89 Wis. 467, 62 N. W. 176; *Mulcairns v. Janesville,* 67 Wis. 24, 29 N. W. 565; and other cases.

This is a mistaken correlation of distinct and independent rules. When a city creates a nuisance it is not exercising a governmental function, but is doing something forbidden

by law. Where an object is of a construction not forbidden by law and in a place authorized by law, it is impossible that it should be a nuisance. It is not unlawful to use dump wagons. If mere averment or proof that a useful implement or vehicle was attractive to children would make its use on the streets unlawful and its presence a nuisance, most of the useful vehicles, implements, and appliances must be withdrawn from the service of mankind. An automobile, a carriage, or a dumping wagon is each attractive to and dangerous to children, and often dangerous even to adults. But that does not make either, when in legitimate use, a nuisance in the public street. *Kelly v. Southern Wis. R. Co.* 152 Wis. 328, 140 N. W. 60, is distinguishable, inasmuch that the streets are primarily for the purpose of travel or traffic by children or adults on foot or in vehicles, and there an extraordinary use of the street was made at a point therein adjacent to the sidewalk and by the employment of a device dangerous and at the same time attractive to children who might be on the sidewalk for travel or play. The use was not extraordinary in stringing electric wires, but it was extraordinary in that such use of the streets is only occasional and not ordinary. There the negligence of the defendant consisted in placing this appliance where it did and leaving no one near by to guard it or keep children away from it. Here the situation is manifestly different. The driver or operator of a dump wagon lawfully using the street has no more reason to apprehend that children will follow his wagon and take hold of the dump chains than has the driver of a carriage or automobile reason to apprehend that a child is clinging to his vehicle. There being nothing unlawful in the use of such wagons, and no rule of diligence requiring the owner or operator to exercise more than ordinary care in their operation, and there being no averment that the driver of this dump wagon knew, or in the exercise of ordinary care should have known, that the child was in contact with this dump

wagon, the case is extremely weak if not defective even on the negligence of the driver of the wagon. But it is not necessary to decide this point. If we assume that there was negligence on the part of the driver or licensee, the city was not responsible for that negligence, because in the care and maintenance of highways the city is exercising a governmental duty, not for its own advantage or gain, but as an administrative agency of the state. This view seems to be well supported by the case of *Evans v. Sheboygan,* 153 Wis. 287, 141 N. W. 265, and cases cited in that opinion. There is no such common-law liability as expressed by the maxim *respondeat superior* in such cases. It follows that the order of the circuit court must be affirmed.

*By the Court.*—Order affirmed.

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DRELLA, Administrator, Appellant, vs. CONNOR LUMBER & LAND COMPANY, Respondent.

*December 12, 1913—January 13, 1914.*

*Master and servant: Death of employee: Unsafe working place: Warning: Felling of trees: Extraordinary accident: Direction of verdict.*

On a cold winter day plaintiff's intestate, about seventeen years of age, was engaged with another sawyer, two years older, in felling a maple tree which stood, leaning slightly to the west, near the foot of a westerly slope. As it was about to fall, he walked eastward about eight feet from the tree. In falling, the top of the maple struck a birch tree which stood more than forty-four feet distant towards the west and down the slope, bent it to the west, and then rolled off from it. The birch tree, when released, whipped back, broke off about six feet from the ground by reason of a defect unknown to defendant or to deceased, and the whole tree was thrown eastward so that its top struck and killed the deceased. No other trees of any size were standing near. The deceased had had some experience in the woods and in sawing, and his companion had

**worked about twelve months as a sawyer. *Held*, that a verdict for defendant was properly directed, it being evident that the place was as free from danger as the nature of the employment would reasonably permit, that defendant exercised ordinary care in sending the deceased to cut the tree, and that the accident was so extraordinary that it could not be said that defendant ought to have anticipated it and to have warned the deceased of the danger.**

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Action by the administrator of the estate of John Drella, deceased, to recover damages for the death of said deceased, which occurred on January 6, 1909, and claimed to have been caused by the negligence of the defendant. Near the bottom of the westerly slope of a hill about twenty-five feet high stood a maple tree twenty-two inches in diameter, about ninety feet high, fifty-three feet thereof being the top. It leaned slightly towards the west. Forty-four feet and five inches a little south of west of it, and at a level five and one-half feet below that of the maple, stood a birch tree about thirteen inches in diameter. On a cold winter's day the deceased, who was about seventeen years of age, was sent with his brother, about nineteen years of age, to saw two birch trees and the maple in question left standing near the bottom of the westerly slope of the hill. The two birch trees were in a northwesterly direction from the maple and had been felled before the maple was cut. There were no other trees of any size in the neighborhood where the maple stood. In cutting it the deceased and his brother intended to have it fall in a westerly direction. According to instructions given by the foreman, they notched it deeply on the west side to prevent it splitting, and when it was about to fall the deceased walked straight east about eight feet from the tree. The top of the maple struck the birch tree first mentioned, bent it towards the west, then rolled off from it, and as the birch tree was released it whipped back, broke about six feet

from the bottom, and the whole tree thus broken off was thrown eastward so that the top thereof struck the deceased and killed him.

A number of grounds of negligence are alleged in the complaint, but the only grounds the evidence would tend to sustain are that the defendant was negligent in failing to warn the deceased of the danger of the maple striking the birch tree and that the limbs thereof or the tree itself might be thrown back so as to injure him, and that he was not given a safe place in which to work. The deceased had worked in the woods during the winter of 1907 sawing part of the time. During the winter of 1908 he worked from ten to twenty days sawing. In 1909 he had worked from November 16th until the time of the accident, sawing most of the time. His brother, who was sawing with him, had sawed about twelve months in all. The evidence showed that up to the time of the accident they had performed their work in a satisfactory manner. At the close of the testimony the court granted a motion to direct a verdict for the defendant. From a judgment entered accordingly the plaintiff appealed.

For the appellant the cause was submitted on the brief of *Eberlein & Eberlein.*

For the respondent there was a brief by *Goggins & Brazeau,* and oral argument by *T. W. Brazeau.*

VINJE, J. If the defendant was guilty of no actionable negligence the trial court properly directed a verdict in its behalf. It is evident from the situation existing at the time the maple was cut that the place was as free from danger as the nature of the employment would reasonably permit, and that the master exercised ordinary care in sending the deceased to cut the tree. In comparison with places in which trees ordinarily have to be cut in logging, the one in question was unusually free from danger. No tree of any size stood within forty feet of it. The birch that broke was over forty-

four feet away and located further down the slope. In no view of the situation can defendant be said to have furnished an unsafe place in which to cut the maple.

Should the deceased have been warned of the likelihood of the maple falling on the birch and of the latter breaking in such a way as to be thrown back and injure him? The ordinary and usual result of a tree the size and length of the maple falling upon the birch would be to completely crush it, or strip its branches, bearing everything to the ground. The accident in question was so unusual and so extraordinary in its nature that no ordinarily careful man could be held to reasonably anticipate the result that followed. True, no one can tell where limbs may be thrown when a tree is felled in the woods, especially on a cold winter day when they are frozen. But this fact was as well known to the deceased as it was to his employer. No one would anticipate that limbs from the birch would be thrown back a distance of over forty-four feet even if the top of the maple struck it, much less that the whole tree itself would be broken off and thrown back far enough to injure deceased where he stood. The evidence shows there was a defect on the west side of the birch tree where it broke that was unknown to both the defendant and the deceased at the time the maple was cut. But, aside from this defect, it must be held that deceased met his death by reason of a pure accident for which no one was to blame. The trial court therefore properly directed a verdict for the defendant.

*By the Court.*—Judgment affirmed.

BARNES, J., took no part.

STATE EX REL. SECOND WARD SAVINGS BANK, Respondent, vs. LEUCH, City Clerk, Appellant.

*December 13, 1913—January 13, 1914.*

*Taxation: Assessment of bank stock: Board of review:* Certiorari: *Bank may maintain: Deduction of value of realty: Branch offices: Rebuilding of banking house.*

1. In view of the option given by sec. 1057*b*, Stats. 1911, to a bank to pay the taxes on all shares of its stock and charge the sum paid to expenses, any illegal and substantial increase of taxes which tends to prevent the bank from making its shares attractive in that manner is a special and direct injury to the interests of the bank itself, which qualifies it to maintain an action of *certiorari* to test the validity of the assessment.
2. Whether sec. 1061, Stats. 1911, applies to the assessment of bank stock at all is *doubted*. If it is applicable, its requirements are substantially complied with by the appearance and examination of the bank officers, the bank being considered the agent of the stockholders so far as the assessment is concerned.
3. Construing it fairly and reasonably according to the manifest intent to avoid double taxation, the provision in sec. 1057, Stats. 1911, that if "the building in which" a "bank maintains its offices and transacts its business be owned by such bank, the assessed value thereof, including the land on which it is located, if owned by such bank, shall be deducted from the total value of" the shares of stock, includes the branch offices of the bank as well as its main banking house.
4. Although a bank is rebuilding its main banking house and is temporarily occupying rented quarters, it nevertheless "maintains its offices and transacts its business" in the main banking house, within the meaning of the statute.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

*Certiorari* to reverse the action of the board of review of the city of Milwaukee in the year 1912 in assessing the shares of capital stock of the respondent bank. Said bank is incorporated under the laws of the state and has 10,000 shares of stock with a par value of $100 each. It appeared

that the bank has one main banking house and two branch offices for the receiving of deposits in Milwaukee, and owns the real estate on which they stand. In 1912 the bank was rebuilding its main banking house (which it had occupied for some years) and was temporarily occupying rented quarters while the rebuilding was going on. The assessor assessed the value of the bank stock at $150 per share, but refused to deduct from the gross sum the assessed valuation of the real estate on which the main banking house and the branch offices are situated. The respondent bank appeared before the board of review and objected to the assessment of the bank stock on the ground that the gross value of the said lands and buildings should have been deducted therefrom. The board of review refused to make any deduction, but affirmed the assessment made by the assessor, whereupon the bank brought this action. The circuit court reversed the action of the board and held that the value of the lands and buildings should be deducted from the gross value of the stock, and from that judgment this appeal is taken.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Garfield S. Canright,* assistant city attorney, and oral argument by *Mr. Canright.*

For the respondent there was a brief by *Rollin B. Mallory* and *Edward W. Spencer,* attorneys, and a separate brief by *Russell Jackson,* of counsel, and oral argument by *Mr. Mallory* and *Mr. Jackson.*

WINSLOW, C. J. Two preliminary objections are urged which will be briefly considered. It is said (1) that the bank cannot maintain this action because of lack of substantial interest in the controversy, and (2) that the assessment cannot be questioned because the stockholders of the bank did not appear before the board and submit themselves to examination. We regard these objections as not well taken.

It is true that the assessment of bank stock is made

against the shareholders, but such assessments are required to be entered on the assessment roll of the district where the bank is located and separately from the assessment of other personal property assessable to the owners. Sec. 1042, Stats. 1911. This fact alone would cut little figure on the question, but when it is taken in connection with the provisions of secs. 1057*a* and 1057*b*, Stats. 1911, there seems considerable significance in it. The separation in assessment is evidently made for the purpose of making it possible for a bank to handle and pay all the taxes on its stock at one payment and charge the payment up to the general expense account, or at its option make the proper charge on its books against each stockholder for the amount paid on behalf of that stockholder. Sec. 1057*a* provides that the taxes levied shall be a lien upon the shares on which they are levied, which may be enforced by levy on the stock and sale thereof by the officer in the same manner in which corporate stock is levied upon and sold under an execution. Sec. 1057*b* provides that the bank itself is authorized to pay the taxes and have a lien on the shares for the amount paid, as well as for costs and expenses incurred, or may at its option pay the taxes for all stockholders in such bank out of its earnings or other available resources as the expenses of such bank corporation.

It does not appear in the present case whether the bank proposes to exercise the option given to it in the section last cited, although the inference would seem to be strong that it does; but however this may be, it has the undoubted right to do so, and in view of that legal right the question whether the bank suffers any special and direct injury by an illegal increase of taxation upon its shares of stock is to be considered. It is clear that in one sense any substantial increase of taxation on the shares of an incorporated bank is an injury to the corporation itself as well as to the separate interests of the stockholders. Every corporation is directly interested

in the value of its shares of stock, and anything which tends to reduce that value is inimical to the interests of the corporation. In addition to this general injury, we have in the present case the fact that the bank has the option to pay all the taxes and charge the sum paid to expenses. The fact that the bank has this right and exercises it unquestionably operates to make its shares more attractive in the market, and any illegal and substantial increase of taxes which tends to prevent the bank from making its shares attractive in this manner must, we think, be considered a special and direct injury to the interests of the bank itself, which qualifies it to maintain this action. *State ex rel. Milwaukee Med. College v. Chittenden,* 127 Wis. 468, at page 497 (107 N. W. 500).

The considerations just stated go far to answer the second objection. If the bank be directly interested in the action of the board, it would follow logically, if not necessarily, that in the absence of some express statute to the contrary it ought to have the right to review that action on *certiorari.* But it is said that the provisions of sec. 1061, Stats. 1911, prevent any review of the board's action in the present case. This section, after providing for the review of the assessor's roll by the board of review and for the appearance before the board of any person dissatisfied with the assessor's valuation, provides in substance that no person shall in any action be allowed to question the valuation of personal property assessed to him unless in person or by agent he shall have first presented his objections before the board and presented evidence in support thereof, and made full disclosure under oath of all his personal property liable to assessment in the district. The claim is that, as the stockholders have not appeared before the board, the assessment is not now open to question. A sufficient answer to this contention is that the bank must logically be considered as the agent of the stockholder so far as the assessment of bank stock is concerned, and that the officers of the bank appeared and submitted themselves to examination.

It may well be doubted whether this section applies to the assessment of bank stock at all, because that assessment must be made at the home of the bank, which is often at great distance from the home of the stockholder, and it would be manifestly very burdensome, if not unreasonable, to require such a stockholder to travel to the assessment district where the bank is located and there submit to examination. If, however, it be conceded that the section applies to assessments of bank stock, we think its requirements have been substantially complied with by the appearance and examination of the bank officers.

As to the merits of the controversy, we think that the judgment of the trial court was clearly right. Sec. 1057, Stats. 1911, provides that "If the building in which such bank maintains its offices and transacts its business be owned by such bank, the assessed value thereof, including the land on which it is located, if owned by such bank, shall be deducted from the total value of such shares." Sec. 1057*c* provides that the taxation of the shares of stock shall be in lieu of all taxes upon "the capital, surplus, property and assets . . . except that no real estate owned by any bank . . . or constituting the whole or any part of its capital, surplus or assets shall be exempt from taxation."

The object of the provision in sec. 1057 providing for the deduction of the value of the bank's banking house and site, if owned by it, from the gross valuation of the shares of stock is not to exempt the real estate from taxation, but simply to avoid double taxation. The banking house and site is taxed as real estate, but it is a part of the assets of the bank and so enhances to that extent the value of the bank stock, and thus would be taxed again in the taxation of the stock if it were not for this provision. Such a statute calls for fair and just rather than restricted construction. While the statute refers to "*the* building," it is very plain that the idea was that the real estate which the bank owned and was utilizing to carry on its business was not to

be taxed twice. Doubtless the contingency that the bank might have a main banking house and a branch office had not occurred to the persons who drafted the statute, but the bank as truly "maintains its office and transacts its business" at the branch office as at the main banking house, if it may legally maintain a branch office; and it cannot be claimed that it may not do so in view of the fact that the branch office was existing at the time of the passage of ch. 135, Laws of 1909. We reach the conclusion that under a fair and just construction of the law in view of the object to be accomplished, the branch office is included within the clause in question as fully as the main banking house.

The same considerations are practically decisive upon the second contention made by the appellant, namely, the contention that because the bank was rebuilding its main banking house and temporarily occupying rented quarters during the work of rebuilding it did not maintain its office and transact its business there within the meaning of the statute. The mere temporary interruption in the active use of the building for banking purposes, caused by the making of necessary repairs or enlargements to meet the demands of the business, should not in reason be held to make any difference in its legal status under the statute in question. A homestead remains a homestead notwithstanding a removal therefrom by the owner if the removal be for a temporary purpose merely, with intention to re-occupy. *Bartle v. Bartle,* 132 Wis. 392, 112 N. W. 471. The situation here is quite analogous. Other analogous situations might be referred to, but it does not seem necessary. Construing the law fairly and reasonably according to its manifest intent, we find no difficulty in concluding that the value of the main banking house and the land on which it stands should have been deducted from the gross valuation of the shares of stock.

*By the Court.*—Judgment affirmed.

STATE EX REL. MARSHALL & ILSLEY BANK, Respondent, vs. LEUCH, City Clerk, Appellant.

*December 13, 1913—January 13, 1914.*

*Taxation: Voluntary payment of tax: Waiver of illegality.*

1. By the voluntary payment of a tax all right to bring action to recover it back or question its legality is waived.
2. In the absence of coercion, fraud, or mistake of fact, one cannot pay a tax without objection and afterwards demand his money back and maintain an action to recover it merely because he forgot at the time of payment that he proposed to contest the tax or because he did not know the legal effect of a voluntary payment.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Garfield S. Canright,* assistant city attorney, and oral argument by *Mr. Canright.*

For the respondent there was a brief by *Harper & McMynn,* and oral argument by *John F. Harper.*

WINSLOW, C. J. This is an action of *certiorari* brought to reverse the action of the board of review of the city of Milwaukee for the year 1912 in refusing to deduct from the gross valuation of the capital stock of the bank the value of a building then under construction for its main banking house, but which had never been occupied, as well as the value of a branch office and the land on which it stands. The trial court reversed the action of the board of review, and this appeal is taken from that judgment. We think this judgment must be reversed because it appears that the taxes in question were voluntarily paid by the bank, without protest or compulsion, December 31, 1912, and before the judgment in the case was rendered. This fact was brought to the attention of the court by motion before judgment. The fact of the voluntary payment is undisputed, but it is sought to avoid its effects by a showing that the

president of the bank, who made the payment, did not at the time have in mind the fact that this proceeding was pending, and the further fact that about a week later the president gave written notice of his mistake to the city officers and demanded back the money paid, and offered to return the receipts.

It is very well settled that by the voluntary payment of a tax all right to bring action to recover it back or question its legality is waived. *Custin v. Viroqua,* 67 Wis. 314, 30 N. W. 515. The principle is a salutary one. It tends to quiet disputes, diminish litigation, and relieve from embarrassment the transaction of public business. If a person could, without any coercion, fraud, or mistake of fact, pay a tax without objection and afterwards demand his money back and successfully maintain an action to recover it because he forgot at the time of payment that he proposed to contest the tax or because he did not know the legal effect of a voluntary payment, the door would be opened wide for actions to recover back payments made voluntarily, but subsequently repented of. We decline to open that door. We think that upon the fact of the voluntary payment being brought to the attention of the court the writ should have been quashed.

*By the Court.*—Judgment reversed, and action remanded with directions to quash the writ of *certiorari.*

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STATE EX REL. MARSHALL & ILSLEY BANK and another, Respondents, vs. LEUCH, City Clerk, Appellant.

*December 13, 1913—January 13, 1914.*

***Taxation: Bank stock: Deduction of value of land "owned" by bank: Leasehold interest.***

**Land held by a bank under lease, even though it be a long-time lease—in this case for ninety-nine years—with privilege of indefinite renewal, is not "owned by such bank," within the meaning of sec. 1057, Stats. 1911.**

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Modified and affirmed.*

This is an action of *certiorari* brought to reverse the action of the board of review of the city of Milwaukee for the year 1913 in refusing to deduct from the gross valuation of the capital stock of the bank the value of the building in which the bank conducts a branch office and the land on which it stands (said building and land being owned by the bank in fee), as well as the value of the land on which the main banking house of the bank is situated, which is not owned in fee by the bank but held under a ninety-nine year lease with the privilege of unlimited renewal. The circuit court held that both deductions should have been made and the city clerk appeals.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Garfield S. Canright,* assistant city attorney, and oral argument by *Mr. Canright.*

For the respondent bank there was a brief by *Harper & McMynn,* and oral argument by *John F. Harper.*

WINSLOW, C. J. The question whether the value of the branch office and the land owned by the bank on which it stands should have been deducted from the total valuation of the capital stock of the bank is answered in the affirmative by the decision in the case of *State ex rel. Second Ward Sav. Bank v. Leuch, ante,* p. 493, 144 N. W. 1119.

As to the land on which the main banking house stands, which is not owned in fee by the bank but held under a ninety-nine year lease, different considerations arise.

The statute says that the assessed value of the building in which the bank maintains its offices and transacts its business if owned by the bank, including the land on which it is located "if owned by such bank," shall be deducted from the total value of the shares of stock. Sec. 1057, Stats. 1911. The circuit court held that the ninety-nine year

lease with the privilege of unlimited renewal was equivalent to ownership for taxation purposes. We think this ruling was erroneous.

The word "own" does not necessarily mean ownership of the fee; it may be used to designate any one of a great variety of interests in property, even including a short leasehold. This subject is fully discussed with abundant illustrations by Mr. Justice DODGE in the opinion in *Merrill R. & L. Co. v. Merrill,* 119 Wis. 249, 96 N. W. 686. In that case it was held that land held under lease for five years was "owned" by a public utility corporation within the meaning of the statute providing that where a street railway company is taxed under the license taxation system its real and personal property "owned" and used in the conduct of its business shall be exempt from taxation.

In every case where construction is necessary to determine the sense in which the word is used, the object sought to be reached by the statute is the most important consideration. The object of the present statute is to avoid double taxation of the land. Where a bank has permanently invested a part of its assets in land by purchasing the fee thereof at a fair valuation, that sum so permanently invested must necessarily be represented in the gross valuation fixed by the assessor on the total bank stock. So when the bank stock is taxed as the statute provides, the land is to all intents and purposes fully taxed at that time. The land itself remains on the tax roll, however, and is assessed and taxed just the same as other land, under the provisions of sec. 1057*c*. So in order to avoid double taxation the legislature has adopted the expedient of reducing the valuation of the capital stock by the amount of the valuation of the land.

This is quite plain, simple, and eminently fair. But when the bank has put no part of its capital or assets into the land, but has only entered into a contract to pay certain sums annually as rental of land for a series of years, can it be

said that any part of the gross valuation of capital stock represents the land, or can it be said that the land is taxed at all when the capital stock is taxed? We have been unable to see how this can be answered in the affirmative.

Where the bank owns the land its reasonable value goes into the book value of the stock; where it simply leases land, its value nowhere enters into the book value of the stock, but on the contrary the annual rental enters into the expense account and tends to lower the book value and the market value of the stock.

In view of the purpose of the statute, it is clear to our minds that the word "own" in the statute before us should not be construed as including land held under lease, even though it be a long-time lease with privilege of indefinite renewal.

It follows that the judgment must be modified by reversing that part thereof which directs that the assessed valuation of the land on which the main banking house stands be deducted from the assessed valuation of the capital stock and by reinstating the decision of the board of review in that regard, and that the judgment as so modified must be affirmed.

*By the Court.*—Judgment modified as indicated in the opinion, and as so modified affirmed, with costs to the appellant.

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MORODER, Appellant, vs. FOX, Respondent.

*October 31, 1913—February 3, 1914.*

*Landlord and tenant: Lease construed: Negligence: Bursting of water pipes: Liability of lessor.*

1. Plaintiff rented from defendant the first floor and part of the basement of a three-story building under a lease which, in the printed part thereof, required him "to take and use all necessary precautions to prevent damages to any of the water pipes

and water works upon said premises, or to any part of said demised premises, by frost or otherwise, and to pay all damages done to said premises by reason of bursting of water pipes, and to turn and let the water out of the pipes in said premises whenever it shall be necessary to do so, to prevent it from freezing or injuring said pipes and property." When the lease was made the second and third floors of the building were occupied as flats by other tenants, each of whom did his own heating. There was but one turn-off for the water, which was located in the basement, accessible to both plaintiff and defendant. Turning off the water there cut off the supply from all the tenants. *Held*, that the quoted provision was intended to make the lessee responsible only for the pipes in the portion of the premises leased by him; that the words "said premises" refer to the premises leased and not to the whole building in which they were situated.

2. The flat on the second floor afterwards became vacant and so remained for some time, in the possession of the defendant, who knew that it was not heated and that the water pipes running through it were unprotected. *Held*, that he was negligent in permitting the premises so to remain during the winter time, and became liable to plaintiff for damage to the goods of the latter on the first floor proximately caused by the freezing of the water and bursting of the pipes on the second floor.

TIMLIN and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

Action to recover damages sustained by reason of the bursting of water pipes above plaintiff's premises resulting in damage to goods contained therein. On the 18th day of June, 1911, the plaintiff leased from the defendant for a period of two years from May 1, 1911, the first floor and part of the basement of a three-story building situated in the city of Milwaukee. The printed portion of the lease contained this agreement on the part of the lessee:

"To take and use all necessary precautions to prevent damages to any of the water pipes and water works upon said premises, or to any part of said demised premises, by frost or otherwise, and to pay all damages done to said

premises by reason of bursting of water pipes, and to turn and let the water out of the pipes in said premises whenever it shall be necessary to do so, to prevent it from freezing or injuring said pipes and property."

Plaintiff occupied the first floor as a store and workshop and directly above it were two flats, one in the second and one in the third story, which at the time the lease was executed were occupied by other tenants of the defendant. At the time the damages were sustained only the third floor of said building was occupied as a flat. There was but one water meter and one set of water pipes for the use of the first floor and the two flats above, and the turn-off was located in the basement, so that if the water had been turned off there, the tenants on the other floors would have had their water supply shut off. In September the flat on the second floor was vacated, and remained so until the 5th day of January, 1912, when, owing to severe cold, the pipes in the second flat burst, large quantities of water escaped through the floor and ceiling of the premises occupied by the plaintiff and directly upon his stock of goods, a greater portion of which was water-soaked and damaged. At the time the pipes burst there was no heat in the second floor and the pipes were not protected from frost in any way.

The case was first tried in the civil court, and the judge thereof held the defendant liable and assessed plaintiff's damages in the sum of $250, and entered judgment accordingly. An appeal was taken to the circuit court, which resulted in a reversal of the judgment on the ground that plaintiff, by the provision of the lease quoted, had agreed to become responsible for any damage done by the freezing or bursting of the water pipes in question. From a judgment entered accordingly the plaintiff appealed.

For the appellant the cause was submitted on the brief of *Alexander & Burke.*

For the respondent there was a brief by *Houghton, Neelen & Houghton,* and oral argument by *Albert Houghton.*

The following opinion was filed November 18, 1913:

VINJE, J. It appears that plaintiff rented the first story and part of the basement of a three-story building, and that at the time the lease was executed the second and third stories were used as flats. His lease required him to "take and use all necessary precautions to prevent damages to any of the water pipes and water works upon said premises, or to any part of said demised premises, by frost or otherwise, and to pay all damages done to said premises by reason of bursting of said water pipes, and to turn and let the water out of the pipes in said premises whenever it shall be necessary to do so, to prevent it from freezing or injuring said pipes and property." Do these provisions of the lease obligate the plaintiff to so care for the water pipes that they shall not burst in those portions of the building not leased or used by him? The provisions are in the printed form of the lease, and we think it quite clear that they were intended to make the tenant responsible only for the pipes in the portion of the premises leased by him; that the words *said premises* refer to the premises leased, and not to the whole building in which they are situated. In the instant case there was a flat in the second story, and one in the third story occupied by other tenants of the landlord. It could not have been the intention of the parties that the plaintiff should become responsible for the water pipes in those two flats to which he had no access and over which he could exercise no control. True, there was but one shut-off for the store occupied by the plaintiff and the two flats, which was located in the basement and to which both the plaintiff and defendant had access. But plaintiff could not shut off the water for the second, or vacant, flat without at the same time shutting it off for the third flat, which was occupied. The only way to prevent the pipes from freezing in the second flat was to heat it, or sufficiently wrap the pipes, as found by the civil court.

However, that is immaterial, since under the terms of the lease, as we construe it, he was chargeable with the condition of the water pipes only in the premises leased by him.

From the time the tenant of the flat on the second floor vacated the same in September up to and including the time the damage was done, the defendant was in possession of it, as was found by the civil court and as the fact was. Being in possession thereof, irrespective of the relation of landlord and tenant between the parties, it became his duty to exercise ordinary care to so use the same as not to injure plaintiff in the enjoyment of his premises. Knowing that the premises were vacant and unheated and that the water pipes running through the same to supply the flat on the third story with water were uncovered and unprotected from frost, it was negligence to allow them so to remain during the winter time. For such negligence he became liable to plaintiff who sustained damage as a proximate result thereof. The case of *Priest v. Nichols,* 116 Mass. 401, is very much in point. The facts and ruling thereon are thus stated by the court:

"The plaintiffs occupied as tenants the lower floor of a building belonging to the defendants. The defendants occupied the floor above. There was a pipe leading through the plaintiffs' premises which conveyed the waste water and material from the manufactory, sinks and water closet of the defendants to the sewer below. This pipe was alleged to be in charge of the defendants, and evidence was offered that they had so treated it, and had, from time to time, upon notice, made repairs upon it. But they negligently suffered it to be out of repair, whereby the water damaged the goods of the plaintiffs. It was a question of fact for the jury, whether the pipe was in charge of the defendants, and was out of repair through their negligence. The rule that a landlord is not bound to keep the premises of his tenant in repair, and therefore cannot be held responsible for negligence, if out of repair, has no application to the facts presented in this case."

It was held that plaintiff was entitled to recover. In *Buckley v. Cunningham,* 103 Ala. 449, 15 South. 826, the contrary was held under somewhat similar facts. In the following cases recoveries have been had for the negligent escape of water by a tenant or owner causing damage to another tenant: *Warren v. Kauffman,* 2 Phila. 259; *Rosenfield v. Arrol,* 44 Minn. 395, 46 N. W. 768; *Killion v. Power,* 51 Pa. St. 429; *Curran v. Weiss,* 6 Misc. 138, 26 N. Y. Supp. 8; *Greco v. Bernheimer,* 17 Misc. 592, 40 N. Y. Supp. 677; *Simon-Reigel C. Co. v. Gordon-Burnham B. Co.* 20 Misc. 598, 46 N. Y. Supp. 416; *Miller v. Benoit,* 29 App. Div. 252, 51 N. Y. Supp. 368, affirmed in 164 N. Y. 590, 58 N. E. 1090; *Pike v. Brittan,* 71 Cal. 159, 11 Pac. 890; *Freidenburg & Co. v. Jones,* 63 Ga. 612. See, also, valuable note in 15 L. R. A. N. S. 545 *et seq.,* where most of these and other cases are collected. For additional cases, where it has been held that the landlord is liable to a tenant for the negligent use of part of the premises retained by him, see *Railton v. Taylor,* 20 R. I. 279, 38 Atl. 980; *Hysore v. Quigley,* 9 Houst. (Del.) 348, 32 Atl. 960; *Defiance W. Co. v. Olinger,* 54 Ohio St. 532, 44 N. E. 238; *Glickauf v. Maurer,* 75 Ill. 289; *Jackson v. Eddy,* 12 Mo. 209; *Stapenhorst v. American Mfg. Co.* 15 Abb. Pr. N. S. 355.

*By the Court.*—Judgment reversed, and cause remanded with directions to affirm the judgment of the civil court.

The following opinion was filed November 21, 1913:

TIMLIN, J. (*dissenting*). The civil court of Milwaukee county held the lessor liable to the lessee for damages caused to the goods of the latter by a water pipe freezing and bursting in the vacant apartments next above those of the lessee. This liability was predicated upon negligence of the lessor. The circuit court upon appeal, apparently without investigating the question of negligence, reversed this judgment on

the ground that a covenant in the lease imposed upon the lessee the duty to prevent this freezing. Neither the civil court nor the circuit court passed upon the real questions in the case, nor has this court done so in the majority opinion whereby the judgment of the circuit court is reversed and that of the civil court affirmed.

All will concede, I think, that if the lessor was guilty of negligence which was the proximate cause of the lessee's damage the lessor would be liable. Also that if the law imposed a duty upon the lessor to cover the water pipes in or heat the vacant apartment and he failed in that duty, thus causing damage to the lessee, he would be liable; although on this latter proposition there is a distinction made and observed in the law between acts of misfeasance on the part of the lessor and mere nonfeasance on his part. In the latter case he would ordinarily not be liable. In this state it seems well settled that there is no liability on the ground of implied contract and that the lessor, if liable at all, must be held liable on the ground of negligence. *McGinn v. French,* 107 Wis. 54, 57, 82 N. W. 724; *Kuhn v. Sol. Heavenrich Co.* 115 Wis. 447, 91 N. W. 994; *Fellows v. Gilhuber,* 82 Wis. 639, 52 N. W. 307. The rule is the same whether the whole or only part of the premises is leased. *Fellows v. Gilhuber, supra; Cole v. McKey,* 66 Wis. 500, 29 N. W. 279; *Dowling v. Nuebling,* 97 Wis. 350, 72 N. W. 871. An exception to this rule is found where the defect is a concealed one, known to the landlord and not known to the tenant, and not discoverable by the tenant in the exercise of that degree of care which the law demands of him. *Anderson v. Hayes,* 101 Wis. 538, 77 N. W. 891. The lessor is entitled to no immunity merely because he is lessor, and in all cases in which, by law, he owes a duty to the lessee and negligently performs or negligently omits to perform that duty, he will be liable like other persons. Thus in the Georgia cases cited in the majority opinion there was a statute imposing upon the land-

lord the duty to repair, although this statute is not expressly referred to. Georgia Code of 1868, sec. 2258; of 1883, sec. 2284; of 1895, sec. 3123; also Code of 1868, sec. 2949. Where there is no duty imposed by law there can be no breach of duty, and where there is no breach of duty there can be no actionable negligence. *Goff v. Chippewa River & M. R. Co.* 86 Wis. 237, 245, 56 N. W. 465; *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105, 116, 54 N. W. 24; *Peake v. Buell,* 90 Wis. 508, 63 N. W. 1053.

"To constitute actionable negligence the defendant must be guilty of some wrongful act or breach of positive duty to the plaintiff." *Cole v. McKey, supra.* The facts are established by admissions in the pleadings and by the uncontroverted evidence. The findings of the civil court are not important, because they cannot be invoked in support of the judgment appealed from. But, aside from conclusions, they contain nothing in conflict with the uncontroverted facts. The case was before the circuit court for review upon these facts. The testimony is not contained in the printed case but is in the record and was before the learned circuit court. There is no material controversy upon the facts. The leased premises were "the first floor and part of basement of the three-story brick-veneered building No. 910 3rd street, in the 13th ward of the city of Milwaukee. Same to be used for manufacturing of church goods and retailing." There was a flat or apartment on the second floor and another on the third floor. Each tenant did his own heating. The basement and first floor were heated by a furnace fed and attended to by the plaintiff lessee; the second and third floors by stoves apparently furnished and fed by the lessees of these apartments. There was a water pipe running up from the basement through the first-floor and second-floor premises and supplying each of these and the third-floor tenant with water. The water closet mentioned in the lease was in the basement. The only place at which the water could be shut

off was in the basement and was accessible to all tenants, but the water could not be shut off from one tenant without shutting it off from all. The water pipes were everywhere in good condition, but not protected by any covering material. There is no evidence tending to show that the water pipe which burst was near a window or in any way unusually exposed. The tenants each claimed or held a separate part of the basement and potatoes and other vegetables and coal were kept there, but the shut-off was near the back stairway entrance and accessible to all. The plaintiff lessee had occupied the same premises at and before the time when the defendant became owner by purchase from Strauss, the former lessor of plaintiff. Upon the defendant's purchase the plaintiff surrendered the lease he had from Strauss, which had several months to run, and the lease in question was made by defendant to plaintiff for the same premises but at a reduced rental, and the plaintiff had from defendant the key to the second-floor apartment and other keys for the purpose of giving the keys to the prospective tenants who might call with a view to renting. The plaintiff lessee therefore knew the situation for a longer time than the lessor. He actually occupied the leased premises, while the lessor lived at some distance but in the same city. Both the lessor and lessee knew when the lease was made that the upper apartments were occupied. Both knew that the second floor became vacant sometime in the fall and continued vacant until after the damage occurred. Both knew it was cold weather during the first days of January, and both had access to the vacant apartments while they were so vacant. The plaintiff testifies that he did not know where the water shut-off was in the basement, but he agreed in the covenants of his lease to close it for some purposes, and the evidence is entirely silent with reference to the lessor having any knowledge that the tenant he found in the premises when he bought the property and who agreed to shut off the water for some purposes did

not know where the shut-off was. The evidence is entirely silent with reference to whether the lessee kept his premises heated during the cold spell or at what temperature he maintained the air in his first-floor store or room, and is also silent with reference to the knowledge of the lessor concerning the heat maintained by lessee with his furnace in the part of the building occupied by the lessee. But we must, I think, assume that both knew of the diffusion of heat, of the slow cooling of water, of the tendency of heated air and warm water to ascend, and the lessor, being absent, would probably have the right to presume that the lessee by means of the furnace maintained in his rooms a temperature of about seventy degrees Fahrenheit and the upper apartment something about the same. Both knew that the water could not be shut off in the basement from one tenant without shutting it off from the first, second, and third floors, and the lessee knew that in his manufacturing he had occasion to use water thirty times a day, for so he testifies. The water froze in the pipe near the sink in the second-floor apartment, but we do not know exactly when this happened. We do know that this caused the pipe to break and allowed the water to escape upon the second floor on January 3d or January 5th (it makes no difference which), and from thence came through the ceiling upon the goods of the lessee on the first floor and damaged them. The ceiling seems to have been one which would let water through but not heat. This must have been some days or hours after the water froze in the pipe and burst it, because ice does not break a pipe until it forms solid in it and the water escapes some time thereafter.

Now where is the negligence on the part of the lessor? It seems to be held that he must set up and keep fire in a stove in the vacant second-floor apartment in anticipation of the water freezing in the pipe, or that he must go further than to furnish a pipe in good repair and of good quality and put some kind of a frost-proof cover thereon; and not only this,

but he owed this duty to a tenant who, he had reason to believe, knew all about the physical condition, and much more than he did about the temperature of the house, and who had it in his power to shut off the water and to heat his own apartments and to investigate conditions and temperature in the vacant apartments. Whether or not there was likelihood of the water freezing in and bursting the pipe was largely a matter of judgment, depending upon the temperature of the rooms below and above, how long that temperature had been maintained, how cold it might become, and whether the pipes were emptied. He who lived at a distance could not be said to be careless in leaving these things to those in immediate contact with conditions as they existed, especially when he had in his lease the covenants hereinafter noticed. There was simply inaction, nonfeasance, on the part of the defendant and in a particular in which he owed no duty of diligence to the tenant unless such duty is imposed on him by a sort of judicial legislation. I think the case deserves the comment found in *Buckley v. Cunningham,* 103 Ala. 449, 15 South. 826:

"To declare as matter of law, growing out of the relationship of landlord and tenant, independent of contractual obligation, that the landlord owed a duty to his tenants, in anticipation of a freeze, to see, for the protection of his tenants, that the water was cut off from the pipes, when the facts show that the tenants have equal authority and privilege to shut the water off, or cause it to be shut off at their request, as the landlord, would be to lay down a rule of law, unwarranted by any just principle, or any precedent which we have discovered."

I have found no case amongst the numerous cases cited in the majority opinion which tends to uphold liability of the lessor under the circumstances of the instant case, but the discerning lawyer will find, I think, most of the cited cases make against such liability. This lease, like other written instruments, must be construed with reference to the known

physical condition of the property which is leased. It is quite a mistaken notion of law that we must look into this lease for some covenant on the part of the lessee to absolve the lessor from negligence. Negligence might exist or be absent independently of such covenant. We may consider the covenants of the lease in order to determine whether there was within contemplation of the parties thereunto any duty on the part of the lessor such as the majority opinion imposes upon him.

The lessee covenanted "to keep said premises, including the sewer, outhouse or water closet, sidewalk, street and gutter, clean, and observe all the ordinances of the city," etc. The premises here expressly include more than the demised portion of the building. Immediately following this and relating to it as the nearest antecedent is the covenant "to take and use all necessary precautions to prevent damages to any of the water pipes and water works upon said premises." This must be taken to mean the premises just said. This view is strengthened by the next following part of the sentence, which has no office or meaning unless it refers to something different: "or to any part of said demised premises." So that a fair reading of this covenant is that the lessee shall take and use all necessary precautions to prevent damage to any of the water pipes and water works upon said premises, including the sewer, outhouse, or water closet in the basement, and also to any part of the demised premises, by frost or otherwise, and to pay all damages done to said premises by reason of the bursting of said water pipes. This, as I understand it, casts the duty upon the lessee to protect and prevent damage to any and all water pipes or water works which are in the basement or in the first floor.

When we reflect that this shut-off was in the basement and accessible to the lessee and that necessary precautions must include shutting off the water when necessary, we have the duty cast upon the lessee of shutting off the water at least

for the purpose of preventing certain damage to the pipe "by frost or otherwise." This is made more clear by the following words: "And to turn and let the water out of the pipes in said premises whenever it shall be necessary to do so to prevent it from freezing or injuring said pipes or property." The parties must be held to have known that these pipes of the demised premises could not have been emptied of water or the water shut off without shutting off the water from all above. Therefore, so far as the lessor could grant and the lessee could undertake, the latter was authorized to shut off the water not only from his own premises but from those premises on the second and third floor above his. This removes the objection of lack of authority to do so on the part of the lessee. But its most important bearing is upon the question of the diligence of the lessor. The latter knows that the lessee has so undertaken and is also aware of the superior advantages of the lessee for determining when it might be prudent or necessary to shut off the water. Can it be said that under such circumstances there was contemplated by the parties to this lease any duty on the part of the lessor, living at a distance, to visit the place whenever there was prospect of a cold spell, ascertain the temperature of the lower rooms, estimate the probabilities of the water freezing in the pipes on the second floor, and shut the water off from all the tenants, including the plaintiff? I think not. Under such circumstances was there any duty resting upon the lessor to keep the vacant second-floor apartments heated? This would require putting in a stove, furnishing coal, and employing some one to keep up a fire. No known rule of diligence requires this. There was nothing to suggest the necessity of so doing in the instant case. I do not think it can be said there was any duty of diligence which called upon the lessor to visit the premises in order to ascertain the temperature or to keep a fire in the vacant apartments or to furnish frost-proof covering for the pipes. The

mode of preventing damages to the pipe in the premises of the lessee was provided for, that is to say, to shut off the water to prevent freezing, and it was not contemplated that any other mode of protection was necessary. It was apparent that the lessee would always be in a better position to determine the chances of freezing than the lessor, because that must always depend in great measure upon whether the water was flowing, upon the temperature of lessee's rooms below, and upon the probability of a fall in temperature, and it would require the lessor not only to foresee these things but to come a distance in order to perform a duty which the lessee, on the ground, in contact with the appliances in question and as well able to judge of the probabilities of a fall in temperature and better able to judge of its effect upon the pipes, undertook to do so far as the part demised to him was affected. The undisputed evidence shows it was not customary for lessors not residing in any part of the leased premises to do such things, and the rule that an ordinarily prudent person under like circumstances would have kept a fire in this vacant room or covered the pipe passing through such room with some frost-proof covering is wholly artificial, arbitrary, and unsound. *Buckley v. Cunningham,* 103 Ala. 449, 15 South. 826; *Taylor v. Bailey,* 74 Ill. 178; *McKeon v. Cutter,* 156 Mass. 296, 31 N. E. 389; *Cheeseborough v. Green,* 10 Conn. 318, 26 Am. Dec. 396; *Cole v. McKey,* 66 Wis. 500, 29 N. W. 279; *Peake v. Buell,* 90 Wis. 508, 63 N. W. 1053; *Fellows v. Gilhuber,* 82 Wis. 639, 52 N. W. 307; *Dowling v. Nuebling,* 97 Wis. 350, 72 N. W. 871. See, also, other cases cited in majority opinion.

Negligence cannot be inferred from the fact that the lessor did not put into the premises the latest or best known appliances. *Bernhard v. Reeves,* 6 Wash. 424, 33 Pac. 873.

Then upon the question of contributory negligence. It must be manifest, I think, from the foregoing *résumé* of the uncontroverted facts that it could not be held that the lessor

was negligent without at the same time and upon the same evidence convicting the lessee of contributory negligence. Indeed, the negligence of the lessee was much the greater of the two if we assume that there was negligence on the part of the lessor. The civil court seems to have got over this question of contributory negligence by finding that the covenants of the lease did not require the lessee to preserve that part of the continuous water pipe which extended in and through the second-floor apartment. This is not a question of negligence but a question of covenant. Also by ignoring the fact that the lessee had access to the vacant apartment on the second floor. Also the fact that the lessee knew them to be vacant, and by finding that the lessor had full knowledge that the weather was extremely cold and severe and omitting to find that the lessee had also such knowledge, and by finding that the lessor knew that the water pipes would freeze and burst if they were not so protected, and omitting to find that the lessee had the same opportunity for knowledge and greater familiarity and longer and more constant contact with the conditions existing in and about the leased premises. I presume it is intended that it shall become a rule of law in this state that the lessor owes such duty to the lessee under the circumstances herein detailed, and if this is true I think it furnishes a sufficient justification for this dissent.

I am authorized to say Mr. Justice KERWIN concurs in this dissent.

A motion for a rehearing was denied, with $25 costs, on February 3, 1914.

TORBE, Receiver, Respondent, vs. STRAUSS and another, imp., Appellants.

*November 1, 1913—February 3, 1914.*

*Partnership: Contract: Construction: Liability for unpaid capital: Receivers: Actions by: Parties: Party to contract and real party in interest: Disposition of assets after receivership: Appeal: Questions considered.*

1. A partnership agreement between W. and S. recited that W. had invested $6,700 and S. was to contribute $3,300, and provided that S. should have the option to pay the $3,300 in cash or to secure improvements to be made by some other person for the benefit of the partnership, which should count as so much paid toward his contribution to the capital. *Held* that, to entitle S. to credit for improvements made by a third person upon his procurement or request, they must be paid for by him or furnished without charge to the firm.
2. Improvements procured by S. to be made by a brewing company to the value of $2,000, for which the firm gave a promissory note, pursuant to a contract with the brewing company whereby the firm agreed to buy of it 100 barrels of beer per year for a stated time, and the brewing company agreed, upon that condition being performed, to credit the firm with $220 a year on such note, did not entitle S. to a credit of $2,000 toward his contribution to the capital.
3. An action to recover an unpaid balance of the amount to be contributed by S. to the capital was properly brought in the name of a receiver appointed in an action to dissolve the partnership and for an accounting and settlement of the partnership affairs.
4. Where one S. agreed to go into partnership with W. in a certain business and to contribute a stated amount to the capital, but, when the articles were being drawn up, stated that for business reasons he preferred not to sign them, and procured his brother to sign the same in his place, judgment properly went against both brothers in an action by a receiver to recover the unpaid capital, S. being bound as the real party in interest and his brother as a party to the contract of copartnership.
5. In an action by a receiver to recover capital stock which one partner had agreed but failed to put into the firm—consolidated with an action to dissolve the partnership and settle its business,—upon an appeal by said partner from a judgment against him the questions as to what amounts should be al-

**lowed to the receiver and to his attorney, and what should be done with any balance remaining after settlement of the partnership affairs and the expenses of the receivership, are not properly before the supreme court, but should be determined in the court below in the adjustment of the receiver's account. It may be observed, however, that the balance, if any, which remains after all partnership matters are settled and all partners have contributed their portion of the capital stock should be divided between the partners in the proportion of the interest of each in the net assets of the firm.**

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

An action was brought by F. J. Wildes to dissolve the partnership known as the Juneau Hotel Company under articles signed by himself and one *Oscar A. Strauss.* The complaint in addition to dissolution and accounting demanded the appointment of a receiver and a receiver was appointed. Action was afterwards brought by the receiver to recover capital stock which *Strauss* had agreed to put into the firm, but which he had failed to do, and to settle the partnership business. *William Strauss* and Fred Miller Brewing Company were made parties to this action. The prayer of the complaint demanded an accounting between the defendant F. J. Wildes and *Oscar A. Strauss* and judgment in favor of the plaintiff, and that the defendant Fred Miller Brewing Company be enjoined from prosecuting a suit then pending in Massachusetts regarding the partnership matters, and for other relief.

The defendants *Oscar A. Strauss* and *William Strauss* answered separately. The defendants F. J. Wildes, Lydia H. Wildes, and Fred Miller Brewing Company also answered. The two actions were consolidated and were referred to Hon. G. W. Hazelton, sole referee to hear, try, and determine. The following are the findings of fact and conclusions of law made by the referee:

"That the defendant F. J. Wildes, on or about the 1st day of May, 1908, took possession of the building known as the

Juneau Flats, located on Wisconsin street, in the city of Milwaukee, under a ten-year lease from E. Mariner and the estate of William Mariner, deceased, conducting therein the business of leasing rooms and suites of rooms to individuals and families and maintaining a restaurant for the general public. That during the first year of his occupancy, ending May 1, 1909, said Wildes expended considerable sums of money in furnishing and fitting up the premises for the business he had taken in hand as indicated above, such expenditures aggregating $6,700, as appears from the evidence.

"That during the latter part of said first year of Wildes's occupation of said premises, the said Wildes conceived the idea of changing to some extent the business of the place by converting it into a hotel, with a bar in the basement for the sale of beer and distilled spirits, and of making such other changes as pertain to a hotel. That he made such purpose known by communication in writing to various brewing companies in the city of Milwaukee, and as a result thereof the city agents of several of the different breweries in Milwaukee, to whom such communications had been addressed, called on said Wildes and consulted with him in relation to the said scheme, which involved the expenditure of about $2,000. That among the city agents so calling on said Wildes was the defendant *William Strauss,* who then represented the Fred Miller Brewing Company of Milwaukee, one of the defendants herein; that the said Wildes and the said *Strauss* conferred and consulted together as to the terms upon which the said Brewing Company would be willing to advance the money to cover the expense of fitting up the place, and the said *Strauss* reported to the Fred Miller Brewing Company the result of his negotiations with said Wildes, and made an appointment for said Wildes to consult with some of the officers of the said Brewing Company; that thereafter the said Wildes had such conference, and as a result thereof an agreement was entered into on the 22d day of April, A. D. 1909, by which the said Fred Miller Brewing Company were to advance the sum of $2,000 for the purpose of making certain improvements within the premises leased by said Wildes for the purpose of a bar connection with said hotel, and which terms included the exclusive right to furnish the beer to be retailed at the said bar during the life of the said lease and the delivery of a note to the said

Brewing Company for $2,000, the cost of such improvements, with a satisfactory indorser or surety; that these terms were accepted by said Wildes and the contract was reduced to writing and executed on the 22d day of April, 1909, as hereinbefore stated, and Lydia H. Wildes, the mother of said F. J. Wildes, signed the said note as surety for her said son in compliance with the terms of the said contract and the demands of the said Fred Miller Brewing Company.

"That during the negotiations which resulted in the contract mentioned in the preceding finding of fact, it was disclosed that the said *William Strauss* was inclined to take an interest in the business to be inaugurated and conducted in the said building so as aforesaid leased by said Wildes, and the terms of a partnership were discussed and agreed upon between said F. J. Wildes and said *William Strauss.* The money already invested in fitting and furnishing the premises by said Wildes was considered, and agreed upon at $6,700, and it was arranged and agreed that *Strauss* would put into the new concern as capital stock $3,300 and should have one third of the profits arising from said copartnership and the said Wildes should have two thirds of said profits, and in addition thereto a salary of $100 per month for managing the business, together with a suite of five rooms for the use of himself and his family in the hotel in said premises.

"That when the time approached for drawing up the requisite articles of copartnership, the said *William Strauss* proposed that his brother *Oscar A. Strauss* take his place in the partnership, indicating that the Fred Miller Brewing Company might not approve his going into the concern while acting as its city agent; that said Wildes assented to this proposition, and said copartnership articles were drawn pursuant to that understanding, and duly executed by said F. J. Wildes and *Oscar A. Strauss.*

"That in and by the articles of copartnership which were executed and delivered on the 1st day of May, A. D. 1909, the said *Oscar A. Strauss* was to put $3,300 into the capital stock of the partnership as against $6,700 credited to the said Wildes; and in fact neither the said *Oscar A. Strauss,* nor his brother *William Strauss* for him, complied with said requirement; that only $1,300, part of said $3,300, was advanced or paid into said capital stock; that the said *Oscar A.*

*Strauss* reserved the option to pay the other $2,000 in money or pay the same by securing the payment to the said Fred Miller Brewing Company of the money advanced by said Brewing Company for fitting up the same premises for hotel and bar purposes, which amount was estimated at $2,000, but that in fact the said *Oscar A. Strauss* never exercised said option to assume such indebtedness, and never paid over the same in money nor any part thereof, nor did any one pay the same nor any part thereof for him, and the same now remains wholly and entirely unpaid.

"That thereafter on June 11, A. D. 1910, the said F. J. Wildes duly filed a petition in bankruptcy in the clerk's office of the United States district court for the Eastern district of Wisconsin and was adjudicated a bankrupt; that thereafter such proceedings were duly had that a trustee was appointed who sold at public sale all the right, title, and interest of said Wildes in and to the assets of the Juneau Hotel Company, the copartnership theretofore existing between the said defendants *Strauss* and the said Wildes, to one E. Murphy, who thereafter, for a valuable consideration, transferred the same to the defendant F. J. Wildes, who is now the legal owner and holder thereof.

"That the defendant Fred Miller Brewing Company is the legal owner and holder of the note heretofore mentioned and described herein given by the defendant Wildes and indorsed by his mother, Lydia H. Wildes, to the Fred Miller Brewing Company, and that the amount of said note, less the amount of credits thereon, leaves the principal thereof as $1,707.54. But from what was said on the trial by counsel and what is fairly deducible from the evidence before me, I think the defendant Lydia H. Wildes should have the opportunity to decide whether or not she wishes to interpose any defense to the said note.

"That the defendant *William Strauss,* acting for the said copartnership, entered into an agreement with one Max Freudenfeld to sell to him the assets of the said Juneau Hotel Company and take in payment therefor the sum of $3,000 in cash and the personal property belonging to said Freudenfeld at the Lucerne Hotel on West Water street in the city of Milwaukee, which said *Strauss* estimated to be worth $3,000, and that said agreement was duly consummated. That it developed upon the trial that the claim of the C. W.

Fisher Furniture Company for upwards of $2,000 and which remained unpaid had been arranged for by the assumption of the payment by said Freudenfeld of the same to the amount of $1,410 out of the said $3,000 in cash, the remainder thereof, $1,590, having been paid on the Mariner judgment for rent, and that it appeared in evidence at the trial that the Juneau Hotel Company, said copartnership, had, in consideration of the foregoing assumption of payment by said Freudenfeld of $1,410, been fully and completely discharged from any liability to said Furniture Company by reason of its claim of upwards of $2,000. That the remaining indebtedness of said copartnership was adjusted and paid by the said *William Strauss.*

*Conclusions of law.*

"That the defendants said *Oscar A. Strauss* and *William Strauss* are jointly and severally indebted to the receiver in the said sum of $2,000, the amount found to be remaining unpaid on the said copartnership agreement that *Oscar A. Strauss* should pay $3,300 into the copartnership fund.

"That the agreement and sale of the property of the said copartnership by *William Strauss,* as set forth in the eighth finding of fact and as ratified by said Wildes, constituted a full and complete settlement of any balance which was or might be due from one of said parties to the other by reason of anything growing out of such agreement and sale and the disposition of the proceeds thereof, and the claim of the receiver against *William Strauss* for any balance claimed to remain in his hands from such property so received or the proceeds of the sale thereof is disallowed.

"That the defendant Fred Miller Brewing Company is entitled to judgment against the defendant Lydia H. Wildes upon the note given to said Fred Miller Brewing Company as set forth in the findings of fact herein for the present value of said note, but that the said defendant Lydia H. Wildes should have an opportunity to decide whether she wishes to interpose a defense to said note, and if she desire to question the amount due thereon or to resist the payment of the same she must, within ten days from the filing of this report, serve written notice on the attorney for the Fred Miller Brewing Company to that effect, and thereupon and within five days said attorney shall serve on her attorney a

complaint upon the said note, and such attorney for Lydia H. Wildes shall within five days thereafter serve the answer to said complaint on the attorney for the said Brewing Company, and the issue thus joined shall stand for trial in the proper court. That the injunctional order heretofore granted herein against the said Fred Miller Brewing Company be vacated and set aside at the expiration of ten days from and after the filing of this report.

"That the receiver herein is entitled to judgment against the defendants *Oscar A. Strauss* and *William Strauss* for the said sum of $2,000 with interest thereon from the date of the commencement of this action, with costs and disbursements herein to be taxed.

"That judgment be entered accordingly."

Motions were made by the parties to the suit on the report of the referee and heard, and the court confirmed the report and ordered judgment for the plaintiff. The part of the judgment involved in the present appeal is as follows:

"Adjudged: That the plaintiff recover from the defendants *Oscar A. Strauss* and *William Strauss* the sum of two thousand dollars ($2,000) principal, together with the sum of two hundred seventy-seven and 28-100 dollars ($277.28) costs and disbursements taxed, with interest on $2,000 at six per cent. from September 27, 1911, amounting in the whole to two thousand two hundred seventy-seven and 28-100 dollars ($2,277.28)."

*William E. Burke,* for the appellants.

*C. H. Hamilton,* for the respondent.

The following opinion was filed November 18, 1913:

KERWIN, J. The findings set out in the statement of facts give a sufficient history of the case. The main question is whether *William Strauss* and *Oscar A. Strauss,* or either of them, was liable for the $2,000 advanced by the Fred Miller Brewing Company. This question turns upon the construction of the contract, namely, whether the $2,000 was to be furnished by *Strauss* as capital stock. By the terms of the partnership agreement F. J. Wildes put in

$6,700 and *Strauss* was to put in $3,300. He put in $1,300 in cash, the balance, $2,000, he was to put in by way of improvements, and such part of the balance, if any, not put in by way of improvements was to be furnished in cash. Wildes was to have a two-thirds and *Strauss* a one-third interest in the business, each furnishing capital stock in that proportion. The improvements, amounting to $2,000, were put in by the defendant Fred Miller Brewing Company and were never paid for by either *William Strauss* or *Oscar A. Strauss;* so the only money put into the business as capital stock by *William Strauss* or *Oscar A. Strauss* was $1,300.

The findings are well supported by the evidence, and the question is whether *Strauss* was to put into the firm the balance, $2,000, or whether the making of the improvements by the Fred Miller Brewing Company at the request of *Strauss* was a compliance with the partnership agreement.

The material parts of the partnership contract are the following:

"Second. To that end and purpose the said Fred J. Wildes has contributed sixty-seven hundred dollars ($6,700) in investment already made by him, consisting of furniture equipment, and everything and all property of every kind and description now located at said building. Said *Oscar A. Strauss* is to contribute thirty-three hundred dollars ($3,300) in all, such money to be paid in as follows: Said *Oscar A. Strauss* to have the option to pay in thirty-three hundred dollars ($3,300) in cash and secure the investment of two thousand dollars or any portion thereof by any other person or persons, such amount to be expended in improvements on the first floor or first floor and basement. Any amount of improvements which said *Oscar A. Strauss* secures from any person or persons for the benefit of this partnership to constitute a part payment of the thirty-three hundred dollars ($3,300) to be contributed by said *Oscar A. Strauss.* Should such improvements not be secured by said *Oscar A. Strauss,* then he is to pay the entire sum of thirty-three hundred dollars and invest the same in the partnership. If improvements for less than two thousand dollars ($2,000)

are secured from other persons by *Oscar A. Strauss,* said *Oscar A. Strauss* is then to invest enough money to make up the difference between the amount put in in improvements by other persons for said partnership and the total sum of thirty-three hundred dollars.

"The respective interests of said partners in said partnership business to be: said Fred J. Wildes is the owner of two thirds thereof and said *Oscar A. Strauss* the owner of one third. After all expenses are paid, net profits are to be shared, two thirds to said Fred J. Wildes and one third to said *Oscar A. Strauss.* Any net loss that occurs is to be borne in the same proportion, two thirds by said Fred J. Wildes and one third by said *Oscar A. Strauss.*"

We think it clear from the foregoing contract that *Strauss* was to contribute $3,300 as capital stock, and it is established that he contributed only $1,300. The contention of the learned counsel for appellants is that *Strauss* was to have credit for $2,000 on his capital stock when he got the Miller Brewing Company to put in $2,000 in improvements under the contract with the Fred Miller Brewing Company, which provided that the Brewing Company would advance $2,000 to make the necessary repairs and improvements in the partnership premises and deliver all beer required by the partnership, and complied with the terms of the agreement. By virtue of this contract with the Miller Brewing Company the partnership agreed to buy 100 barrels of beer per year for a stated time and the Brewing Company agreed to credit each year $220 on the contract, if the partnership bought 100 barrels per year and performed its contract. Of course, whatever value there was in this contract with the Brewing Company, *Strauss* as a member of the partnership got the benefit of it. That was doubtless what *William Strauss* meant when he testified respecting the contract with the Brewing Company. He said:

"That was really what lured me to come in as a partner, that $2,000 which the Brewing Company spent. I was to get the benefit of that, whatever profits were derived from

it, and was figured as part of my interest, I having a one-third interest on a basis of $10,000, and Wildes having a two-thirds interest, and in accordance to that I had the papers drawn up by Mr. Frank Boden, the attorney."

Mr. Boden's memorandum made from statement of the parties as to terms of partnership was produced on the trial in connection with the testimony of Mr. Boden. This memorandum recites:

"Wildes has invested $6,700. *Strauss* is to bring in $3,300 in money and property. Improvements are to be made in the first floor, including principally the café, the bar room and hotel lobby, and basement barber shop. And any improvements which said *Strauss* secures from any person to be made for the hotel on any consideration shall be credited to him as an investment in the partnership the same as though he had paid in a like amount of money, and *Strauss* to pay in as much cash as shall equal the difference between the amount of improvements he secures for the company and $3,300. The partners then to own two-thirds in Wildes and one-third in *Strauss*. . . . The money or improvements brought in by *Strauss* to the extent of $3,300 to be used in improvements to the first floor and the barber shop in the basement at once."

The contract of partnership, in connection with the other evidence, shows clearly that *Strauss* was to pay in the balance, $2,000, in money or secure a like amount in improvements on the partnership property. To secure the improvements clearly meant that he was to pay for them or procure them without charge or burden to Wildes.

Some point is made by counsel for appellants to the effect that, even if *Strauss* is liable for the $2,000, he is not liable to the receiver. This position cannot be sustained. The action was properly brought by the receiver to recover unpaid capital stock. It is further contended that the judgment should not have gone against *William Strauss*. We think the referee and court below were right in awarding judgment against both *Oscar A. Strauss* and *William*

*Strauss.* *William Strauss* was the real party in interest, but for certain business reasons preferred not to sign the articles of copartnership, and got *Oscar A. Strauss* to sign and act in his place, so *William Strauss* was bound as the real party in interest and *Oscar* was bound because a party to the contract of copartnership.

It is also urged that the judgment does not dispose of all the issues in the case. All the issues were before the court and full opportunity afforded to litigate them, and we think all the issues were fully considered and disposed of both by the referee and the court.

It would serve no useful purpose to extend this opinion by going over the issues litigated for the purpose of showing that all matters embraced within the pleadings were disposed of. We think the judgment below is right and that no prejudicial error was committed.

*By the Court.*—The judgment is affirmed.

The appellants moved for a rehearing; and the following opinion was filed February 3, 1914:

KERWIN, J. Counsel for appellants insists upon this motion for rehearing, as he did on the original argument, that all the issues were not disposed of by the trial court. We held on the original hearing that all the issues properly before the court below were considered and disposed of by that court, and we see no reason for receding from that conclusion. The questions which counsel suggests for determination upon this motion were not before the court below, were never passed upon by that court, and are proper questions to be considered and determined in the settlement of the receiver's account and the distribution of the balance, if any, which may remain after adjusting all partnership matters and expense of the receivership. Counsel asks us to determine the following:

(a) "What shall be allowed the receiver?"

(b) "What shall be allowed the receiver's attorney?"

(c) "What shall be done with the balance?"

These are matters to be settled by the court below in the adjustment of the receiver's account, and are not before this court upon this appeal.

It may be well, however, for the information of counsel, that something be said as to the disposition of any part of the assets of the firm which may remain after all partnership matters are settled, as counsel seems to think that advice on that point may prevent further litigation.

On this point, under (c), it may be observed that the balance, if any, which remains after all partnership matters are settled and all partners have contributed their portion of the capital stock should be divided between the partners in the proportion of the interest of each in the net assets of the firm.

*By the Court.*—The motion for rehearing is denied, with $10 costs.

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KASSUBA COMMISSION COMPANY, Appellant, vs. BLODGETT, Respondent.

*November 1, 1913—February 3, 1914.*

***Brokers: Recovery of commission and advances: Gambling contracts.***

**Where purchases and sales of grain for future delivery were made through a broker with no intent on the part of the principal to receive or deliver the grain, but with intent merely to gamble on the market price thereof, if the broker had knowledge of that illegal intent he cannot recover from the principal for commissions or advances upon the transactions.**

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

*William E. Burke,* for the appellant.

For the respondent there was a brief by *Carroll & Carroll,* and oral argument by *G. J. Carroll.*

The following opinion was filed November 18, 1913:

TIMLIN, J. The question presented in this case is whether, upon the following facts found, a broker may recover in a suit against his principal for advances:

The defendant through the plaintiff broker bought grain on the Milwaukee board of trade upon margins, for future delivery, and, before the day for delivery arrived, sold like quantities of grain for like delivery and offset the trades, leaving defendant with a credit of $253.25 in the hands of the plaintiff. Thereafter defendant through this broker made several sales of grain for May, July, and September, 1912, delivery, which the broker on April 27, 1912, closed out by purchasing a like amount of like grain for the like delivery and offset these purchases against the sales. This resulted in a loss of $718.75, which was paid by the broker and for which, together with his commission and less the said balance of $253.25, this suit is brought.

It was found that the plaintiff, when entering into said transactions and making said contracts, intended in good faith to perform the same. Also that it was the intention of the defendant in his transactions through the plaintiff thereby to gamble upon the market price of grain; that he did not intend to make any actual sale or delivery of the grain, but merely intended such transactions as a wager on the future market price of said commodity. "That although defendant did not inform plaintiff that he intended to gamble, plaintiff, from the facts and circumstances, must have had actual knowledge that the defendant, by and in such transactions with it as aforesaid, intended to so in fact gamble; that the defendant did not intend to receive or deliver the grain, but intended to merely settle for the difference between the contract and the market price of the grain contracted for."

We consider this is a sufficient finding that defendant intended a series of gambling contracts and that the broker knew such intention when it acted as the agent of defendant in carrying out the contracts and making the advances or payments on the same. This is not an action between the parties to the contract for the future purchase, sale, transfer, or delivery of personal property as described in sec. 2319*a*, Stats. No doubt, in a suit by a broker to recover commissions and advances, if the contract was void under sec. 2319*a* as a gambling contract there could be no recovery. Where the only question in the case is with reference to the validity of the principal contract, as in *Wagner v. Engel-Millar Co.* 144 Wis. 486, 129 N. W. 392, the legal inquiry should be directed to the validity of that contract. The language used in the case last mentioned is appropriate to that situation, but the contract between the broker and his principal may be invalid for other reasons than that of the gambling nature of the contract between the buyer and seller.

"By the great weight of authority, a broker has no rights as against his customer in a gambling contract of which the broker is cognizant. He cannot recover his commissions for work and labor expended. If he has advanced and lost property in excess of the margin deposited with him, he cannot recover this from his principal." 14 Am. & Eng. Ency. of Law (2d ed.) 640.

A contract for future delivery will be valid and enforceable if one of the parties thereunto intends in good faith to perform, although the other party intended merely a gambling transaction; but this does not conclude the question between the gambler and his aiders when the latter have knowledge of the unlawful intention of their principal and cooperate therein. *Carson v. Milwaukee P. Co.* 133 Wis. 85, 113 N. W. 393. The facts found by the circuit court bring the case within the above quoted rule which is noticed in *Carson v. Milwaukee P. Co., supra,* although that case turned upon the validity of the contract for future delivery.

Where there is no question of invalidity on the ground of the broker aiding and abetting a gambling transaction, the validity of the principal contract under sec. 2319*a* is a question of paramount importance, and to such condition the language of *Wagner v. Engel-Millar Co.* 144 Wis. 486, 129 N. W. 392, is addressed; but as was said in *Carson v. Milwaukee P. Co., supra:*

"Even legitimate transactions furnish many opportunities for collateral wager contracts and gambling, and two persons, broker and principal, knowing the usual way of settling on the board of trade, and knowing that delivery can be insisted upon by either party who is a member of the board of trade and a party to the sale or purchase, but at the same time knowing that, notwithstanding this, these deliveries are very rarely insisted upon, may well enter upon a single trade or series of trades with the intention that no actual commodities shall be received or delivered."

The instant case is stronger, because the findings settle the question as to the illegal intention of one of the parties to this action and knowledge of such intention on the part of the other party to this action, and this being found, the advances were clearly in aid of the illegal enterprise with actual knowledge of its illegality.

*By the Court.*—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on February 3, 1914, and the following opinion was filed:

TIMLIN, J. In this case there was no bill of exceptions. The appellant brought the case here upon a record which finds the validity of the contract of sale as between the parties thereto who are not the parties to this action. Also finds that the defendant intended to engage and was engaged in gambling on the market price of grain, and that the plaintiff, his broker, with knowledge of such intention and in aid thereof, advanced the money and performed the services in

question. There was therefore before the court only a record which compelled the court to either hold that one who knowingly aids a gambling transaction and expends money in so doing can recover it or that he cannot. Our answer is that he cannot. There was no such record in *Wagner v. Engel-Millar Co.* 144 Wis. 486, 129 N. W. 392. If the appellant has suffered injustice it has itself to blame for limiting us to the above question.

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WALLIS, Appellant, vs. FIRST NATIONAL BANK OF RACINE and others, Respondents.

*October 10, 1913—February 3, 1914.*

*Trial by the court: Oral judgment before written decision filed: Directory statute: Injunctional order: Modification: Contempt.*

1. Sec. 2863, Stats., so far as it provides for the filing of a written decision by the court embodying its findings of fact and conclusions of law before judgment is entered, is directory only, and a valid judgment may be pronounced orally, in an action tried by the court, before any written findings and conclusions are made and filed.
2. An oral statement by the trial court in this case, announcing its conclusion as to the relief to which plaintiff was entitled, is *held* to have constituted a pronouncement of a judgment, rather than a mere expression of opinion as to how the case should be decided; and an injunctional order previously issued was thereby modified in accordance with such conclusion.

APPEAL from an order of the municipal court of Racine county: WM. SMIEDING, JR., Judge. *Affirmed.*

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles,* of counsel, and oral argument by *W. C. Quarles.*

*Thomas M. Kearney,* for the respondents

BARNES, J. An injunctional order was issued in this action on May 5, 1913, which was modified on May 31st. The trial of the case was concluded on June 13th, and the findings and judgment were signed on June 30th. On June 27th the defendant, acting on the advice of its attorneys, caused the wall on the front of the two and one-half foot strip described in the opinion handed down on the appeal from the judgment in the above entitled action to be torn down. [See *Wallis v. First Nat. Bank, ante,* p. 306, 143 N. W. 670.] After the entry of judgment the plaintiff procured an order to show cause why the defendant bank, its president and cashier, and its attorneys, E. B. Hand and W. D. Thompson, should not be punished for contempt for disobedience of the order of the court. The court adjudged the parties to be not guilty of contempt and ordered the proceeding dismissed. The plaintiff appeals from such judgment and order. It is not claimed by the defendant that the injunctional order did not prohibit the action which it took on June 27th, although it does insist that the attorneys acted in good faith in giving the advice which they did, and that in any event they cannot be punished in this proceeding. Neither is it claimed by the appellant that under the findings and judgment signed on June 30th the defendant bank would not have the right to do the acts complained of if no continuance of the injunction had been secured under sec. 3061, Stats. At the conclusion of the trial on June 13th the court announced its decision in the case, which decision was taken down by the court reporter. The judgment as signed was entered in accordance with such decision, at least in so far as it pertained to the right of the defendant bank to remove the wall which it caused to be torn down, although satisfactory findings were not prepared and signed until June 30th. It does appear from the affidavit of Mr. Thompson that on June 26th the court settled on the findings it would make.

The trial court held that by the decision pronounced on June 13th the injunctional order was modified so as to permit the bank to do the things complained of, and that plaintiff knew that it was defendant's purpose to remove the wall as soon as the restraint of the temporary injunction was removed, and that no request for a continuance thereof pending an appeal was made. The court further found that plaintiff suffered no damage or injury because of the acts complained of, and that such acts did not defeat, impede, or prejudice any of plaintiff's remedies or rights.

The defendant contends that the judgment of the court was pronounced on June 13th and that the injunctional order was by virtue of such decision modified as of that date so as to permit the doing of the acts now complained of, and relies on the following decisions of this court to support such contention: *Baker v. Baker,* 51 Wis. 538, 548, 8 N. W. 289; *Allen v. Voje,* 114 Wis. 1, 8, 89 N. W. 924; *German Am. Bank v. Powell,* 121 Wis. 575, 577, 99 N. W. 222; *Zahorka v. Geith,* 129 Wis. 498, 505, 506, 109 N. W. 552; and *Comstock v. Boyle,* 134 Wis. 613, 617, 114 N. W. 1110.

Sec. 2863, Stats., reads:

"Upon a trial of a question of fact by the court its decision shall be given in writing and filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly, as of the term at which the cause was tried, and the judge shall state in his decision separately:

"(1) The facts found by him; and

"(2) His conclusions of law thereon."

Clearly this statute contemplates the filing of a written decision by the court embodying its findings of fact and conclusions of law before judgment is entered, because it provides that judgment shall be entered on the decision and in accordance therewith. If the statute is mandatory, the statement made on June 13th is not the judgment of the court.

Certain requirements of this statute have heretofore been held directory only. The provision requiring the written decision to be filed within twenty days after the court at which the trial took place is directory. *Cramer v. Hanaford,* 53 Wis. 85, 10 N. W. 15; *Williams v. Ely,* 13 Wis. 1; *Body v. Jewsen,* 33 Wis. 402; *Klatt v. Mallon,* 61 Wis. 542, 21 N. W. 532. It is not essential that the statutory mandate requiring the court to state its findings of fact and conclusions of law separately should be followed. *Sherman v. Madison Mut. Ins. Co.* 39 Wis. 104, 108; *Willer v. Bergenthal,* 50 Wis. 474, 7 N. W. 352. Neither is it necessary that the findings of fact and conclusions of law should be filed before the judgment is signed, but they may be embodied in the judgment itself. *Wrigglesworth v. Wrigglesworth,* 45 Wis. 255; *Pier v. Prouty,* 67 Wis. 218, 30 N. W. 232. The failure to make either findings of fact or conclusions of law is not reversible error, where the judgment shows that the necessary facts and conclusions must have been found in favor of the prevailing party and the evidence supports the judgment. *Willer v. Bergenthal,* 50 Wis. 474, 7 N. W. 352. And where the court fails to make such findings and conclusions as the statute contemplates, this court will adopt one of three courses: (a) Affirm the judgment if clearly supported by the preponderance of the evidence; (b) reverse if not so supported; or (c) remand for further trial and findings in close cases where the evidence is evenly balanced or nearly so. *Damman v. Damman,* 145 Wis. 122, 125, 128 N. W. 1062; *Closuit v. John Arpin L. Co.* 130 Wis. 258, 110 N. W. 222; *Young v. Miner,* 141 Wis. 501, 504, 124 N. W. 660; *Brown v. Griswold,* 109 Wis. 275, 85 N. W. 363; *Jansen v. Huerth,* 143 Wis. 363, 127 N. W. 945; *Kelm v. Woodbury,* 150 Wis. 499, 504, 137 N. W. 757; *Whalen v. Eagle L. P. Co., ante,* p. 26, 143 N. W. 689.

The precise question which we have before us now was

before the court in *Zahorka v. Geith,* 129 Wis. 498, 505, 506, 109 N. W. 552. It was there held in a case tried by the court, and in which no findings of fact or conclusions of law were ever reduced to writing or filed, and where no judgment was ever signed or reduced to writing, that the decision of the court announced orally from the bench was the judgment in the case, and was a valid judgment. It is true that in this case the clerk made a minute of the judgment pronounced, but his failure so to do would not have affected the validity of the oral judgment. The clerk's entry was not the judgment, but merely evidence of it, and the default of the clerk could not nullify the act of the court. *Baker v. Baker,* 51 Wis. 538, 8 N. W. 289. This case (*Zahorka v. Geith*) decides that the requirement of sec. 2863, Stats., requiring findings of fact and conclusions of law to be filed before there can be a judgment, is directory, or else it must be said that the statute was entirely overlooked by the whole court when the case was decided. This assumption can hardly be indulged in with reference to a statute that is familiar to every practicing lawyer. The divorce judgment involved in the case could hardly be pronounced without taking proof as to the residence of the plaintiff and of her desertion by the defendant, and neither could judgment be rendered until the fact on each of these issues was found in favor of the plaintiff. The only way in which the result could be reached which was reached was to decide that the oral decision was in fact the judgment of the court and that the court in reaching such decision necessarily reached the conclusion that the facts essential to make a case were proven and that a valid judgment might be entered without any written decision making findings of fact and conclusions of law. This case applies the same construction to sec. 2863 that other decisions have applied to sec. 2812, which reads: "Every direction of a court or judge made or entered in writing and not included in a judgment

is denominated an order." Clearly this statute contemplates that orders shall be made and entered in writing. Yet in *Allen v. Voje,* 114 Wis. 1, 8, 89 N. W. 924, it is said:

"An order or judgment is the decision of the court. It may be formulated in writing by the judge, or declared by him orally. In the latter event the duty rests upon the clerk to write the substance upon his records. That was done in this case, and thereupon the order became entered as completely as if written out by the judge himself and signed by him. *Baker v. Baker,* 51 Wis. 538, 8 N. W. 289; *Harris v. Snyder,* 113 Wis. 451, 89 N. W. 660. The writing is, at most, the evidence of the decision in fact rendered. *Findlay v. Knickerbocker Ice Co.* 104 Wis. 375, 378, 80 N. W. 436."

Again, in *German Am. Bank v. Powell,* 121 Wis. 575, 577, 99 N. W. 222, it is said:

"As the written order on file contains a blank at this point, the contention is that it is conclusively shown that no day was fixed. But the written order is not necessarily the decision of the court, but generally is merely evidence thereof. The announcement from the bench is the order or judgment in fact. *Baker v. Baker,* 51 Wis. 538, 8 N. W. 289; *Allen v. Voje,* 114 Wis. 1, 89 N. W. 924. Had the clerk's minutes been introduced, and had it appeared therefrom that the court announced from the bench that the matter would be heard on the 14th of September, the statute would unquestionably have been satisfied, notwithstanding the *hiatus* in the written order."

To the same effect is *Findlay v. Knickerbocker Ice Co.* 104 Wis. 375, 80 N. W. 436.

So we think it must be said that under the construction placed on sec. 2863 a valid judgment may be pronounced and pronounced orally in actions tried by the court, before any written findings and conclusions are made and filed.

Some question has arisen as to whether the language used by the court can in any event be held to be the pronouncement of a judgment or anything more than a mere expres-

sion of opinion as to how the case should be decided. The statement of the court is as follows:

"I have given this case a good deal of thought and attention since the argument on motions to dissolve the preliminary restraining order, and I think I feel as competent to decide it at this time as at any other time.

"The plaintiff owns the first two pieces of real estate described in his complaint and is the owner of an undivided one-half of a strip of land two and one-half feet wide by twenty-nine and one-half feet long which he owns in common with the defendant.

"The ownership is, however, subject to certain rights acquired by the defendant because of the necessity to maintain a common stairway. This stairway right is important to both the plaintiff and the defendant, the plaintiff being the dominant party as of necessity. The right to have that stairway maintained in its present condition; by that I mean as it is now constructed and of the size and height which it now is.

"The determination of a reasonable user cannot play any important part in seeking to consider a common right in land. It seems to me it is set out very definitely in the contract; this stairway that is there now and not some other stairway that may be erected. It is true that the second contract may be more or less ambiguous, but this fact stands out in both contracts that there is to be an inclosed stairway in common. That ownership in common is never lost sight of in the contract of 1885 or 1908. If this is true, no rights can be acquired by the defendant except such as are necessary to maintain the easement in question. In my judgment and my opinion, if this is true this wall cannot be raised so as to include twenty-eight inches more space; if that were done, as threatened by the defendant, it would be a continuing trespass, working, I think, to the damage of the plaintiff, and the injury would be irremediable. I am of the opinion that a judgment should be granted perpetually restraining the defendants from their threatened action to raise the wall to the south of the two and one-half foot strip and inclosing the said space as intended by the defendant to inclose, and also perpetually enjoining the defendant from

changing the general structure of the stairway that is there now. If the stairway is to be replaced it should be replaced and constructed as it is now constructed. Further than here indicated, I quite agree with the submitted findings of fact of the defendant.

"Mr. Hand: As I understand the court, the ruling against the defendant is limited to the raising of the height of that wall on the twenty-nine and one-half foot strip over and above what it already is, and the defendant is also restrained from constructing any other stairway.

"Court: A stairway different in dimension than the one existing there at the present time.

"Mr. Quarles: In regard to the occupation of the two and one-half foot strip above the stairway for the private purposes of the defendant, I think that ought to be decided here.

"Court: I find as to that that the defendant is entitled to the possession of that by necessity to the maintenance of this easement and that it is impossible for it to be in the possession of both.

"Mr. Quarles: I refer to the space above in the case of the erection of a building of ten stories.

"Mr. Thompson: I submit that that is not before the court."

It will be noted that in this statement the court says he has given the case a good deal of consideration and that he is as competent to decide it now as at any time. After discussing the points in the case he says the plaintiff is entitled to relief in two particulars: (a) He has the right to prevent the party wall from being raised or changed, and (b) he has the right to have any new stairway that is put in constructed as the existing stairway was constructed. The written judgment assures these rights to the plaintiff and no more. The conclusion reached by the court on these propositions is prefaced in one case with the statement, "In my judgment and my opinion," and in the other with the statement: "I am of the opinion that a judgment should be granted . . ." We think these statements constituted an announcement and declaration of what the judgment ren-

dered actually was. Plaintiff had the undoubted right to insist that the judgment be reduced to writing so that he could appeal from it, and had the right to insist that an order be entered at once dissolving so much of the injunction as would be vacated by the judgment pronounced, so that plaintiff might preserve his rights by appeal under sec. 3061, or else that the injunction be continued until the judgment pronounced was reduced to writing.

*By the Court.*—Order affirmed.

TIMLIN, J., dissents.

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D. CANALE & CO., Appellant, vs. PAULY & PAULY CHEESE COMPANY, Respondent.

*December 10, 1913—February 3, 1914.*

*Contracts: Validity: Place of contract: Presumptions: Conflict of laws: Statute of frauds.*

1. The presumption that the place of performance of a contract is the place of the contract is not a presumption of law but a presumption of fact, rebuttable by clear, but not necessarily direct, evidence to the contrary.
2. In this case an oral executory contract for the sale of goods for a price exceeding $50 having been made in another state, to be performed by delivery of the goods in Wisconsin, and such contract being valid under the laws of the other state but invalid under the Wisconsin statute of frauds (sec. 2308, Stats.), it is *held*—the question not having been decided as one of fact by the trial court—that the presumption that the place of performance is the place of the contract is overcome by the presumptions that the parties meant to deal with each other honestly, that they knew the law, and that they intended to make a binding contract.
3. In such case the fact that the parties contemplated that the oral agreement would afterwards be reduced to writing is unimportant, where they also intended by the oral agreement to make a contract *in præsenti*.

TIMLIN and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action on contract.

The cause was tried as a court case. These are the facts found, so far as material to be stated:

In Tennessee, July 15, 1909, plaintiff and defendant mutually, orally contracted for the latter to sell the former a quantity of cheese, at a stipulated price, free on board cars at Manitowoc, Wisconsin. The amount involved exceeded the legitimate scope of an executory oral contract under the laws of Wisconsin. The contract was executory in all respects. It was understood that it should be reduced to writing, but that was not made a condition, postponing the closing of the matter. Such understanding was not carried out. In due time plaintiff demanded performance on the part of defendant, which was refused. Because of such refusal, plaintiff was required to purchase an equivalent of cheese at a cost of $15,697.12. The cheese contracted for was worth, when it should have been delivered, $1,250 more than the contract price.

On such facts the court concluded that the place of the contract was Wisconsin because the parties contemplated performance therein, and that, as such an agreement is not enforceable by the laws of this state, judgment was awarded dismissing the cause with costs.

For the appellant there was a brief by *Kelley & Ledvina,* attorneys, and *J. E. McCadden,* of counsel, and oral argument by *Mr. E. L. Kelley* and *Mr. McCadden.*

For the respondent there was a brief by *Kelley & Wyseman,* and oral argument by *H. F. Kelley.* They contended, *inter alia,* that as between the law of the place where the parties were when the contract was made and the law of the place of performance thereof, the latter governs the question of its validity, unless it clearly appears that the parties intended to be governed by the law of the place of making.

*Newman v. Kershaw,* 10 Wis. 333, 340; *Smith v. C. & N. W. R. Co.* 23 Wis. 267; *Shores L. Co. v. Stitt,* 102 Wis. 450, 78 N. W. 562; *Bartlett v. Collins,* 109 Wis. 477, 481. 85 N. W. 703; *Brown v. Gates,* 120 Wis. 349, 97 N. W. 221, 98 N. W. 205; *International H. Co. v. McAdam,* 142 Wis. 114, 118, 124 N. W. 1042; *Emery v. Burbank,* 163 Mass. 326, 39 N. E. 1026; *Orcutt v. Nelson,* 1 Gray, 536; *First Nat. Bank v. Shaw,* 109 Tenn. 237, 70 S. W. 807, 97 Am. St. Rep. 840; *Heaton v. Eldridge,* 56 Ohio St. 87, 46 N. E. 957, 60 Am. St. Rep. 737, 36 L. R. A. 817; *Pittsburg, C., C. & St. L. R. Co. v. Sheppard,* 56 Ohio St. 68, 46 N. E. 957, 60 Am. St. Rep. 732; *Southern Exp. Co. v. Gibbs,* 155 Ala. 303, 46 South. 465, 130 Am. St. Rep. 24; *Swedish Am. Nat. Bank v. First Nat. Bank,* 89 Minn. 98, 113, 94 N. W. 218, 99 Am. St. Rep. 549, 558; *Peet v. Hatcher,* 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45; *Miller v. Tiffany,* 1 Wall. 298; *Bedford v. Eastern B. & L. Asso.* 181 U. S. 227, 242, 21 Sup. Ct. 597; *Dickinson v. Edwards,* 77 N. Y. 573, 577, 578; Story, Conflict of Laws (8th ed.) sec. 280.

MARSHALL, J. It does not seem necessary to consider the distinction between a statute of frauds, in terms making specified contracts unenforceable, and a statute declaring certain contracts void, nor deal with the question of whether a statute of frauds is available as a defense without being pleaded. The conclusion we have arrived at renders such questions unimportant.

There being nothing inherently bad about such a contract as that in question, if it is valid by the place of the agreement, it should be so treated here, regardless of our statute of frauds. *International H. Co. v. McAdam,* 142 Wis. 114, 124 N. W. 1042. So the vital question is, Did the court err in holding the contract to be a Wisconsin agreement? It is conceded that, if the place of the contract is Tennessee

and its validity is governed by the laws of that state, then the decision complained of is wrong.

The trial court seems to have regarded the agreed place of performance conclusive in favor of the claim that the agreement should be held to be a Wisconsin contract. Such circumstance is not necessarily conclusive. The place of a contract is a matter of mutual intention. For aids in discovering such intention, there are some rules, any one of which is persuasive, merely, or conclusive, or not of any evidentiary value, according to circumstances.

The law is thus stated in the *International Harvester Co. Case:*

"As to mere personal contracts the law thereof as to their validity and interpretation, is that of the place where they were made; . . . unless the parties thereto intended that they should be governed by the law of the place of performance, . . . or of some other place; . . . but the intended place, as determined by legal presumption in some cases and evidentiary circumstances in others, settles all questions as to validity."

The trial court, not appreciating, as it seems, that the place of performance merely gives rise to an evidentiary presumption, did not make any finding of fact as to what the mutual intention was, but disposed of the matter as one of law.

The place where a contract is made and is to be performed in a physical sense, is presumed to be the place of the contract, in a legal sense; but that is subject to be rebutted by clear evidence to the contrary. So in case of a contract being physically made in one place and mutually intended to be performed in another, the presumption is, in the absence of efficient evidence to the contrary, that the place of performance is that of the contract, subject to some exceptions not material here.

There is no controversy but what the law is as indicated. Counsel for both sides cite *International H. Co. v. McAdam,*

*supra,* where the subject was fully discussed. So the question at issue comes down to this: Was there evidence efficiently rebutting the effect of the circumstance that Wisconsin was agreed upon as the place of performance? There must be clear, but not, necessarily, direct evidence, in order to overcome such a presumption. In solving the vital question suggested we must view the acts of the parties from a common-sense standpoint, presuming that they intended to deal with each other honestly, in the moral as well as the legal aspects of the matter, and that when they, in form, made the oral agreement, they did not intend any idle ceremony, nor to engage in a transaction where either party could take an unconscionable, inequitable advantage of the other, but that they mutually intended to make an agreement binding on both sides.

So we have the presumption of intention springing from the place of performance, face to face with the presumption that the actors in the matter proceeded with the deliberate purpose of creating a mutually binding obligation, and also the presumption that neither party intended to infract even moral ethics. Place on one side the mere arbitrary evidentiary matter, referable to the circumstance of the place of performance being Wisconsin, and on the other the presumption resting in common sense, common honesty, and moral ethics, and also on such other side the presumption that the representatives of the respective parties knew the law and intended to make a mutually binding trade,—and what result do we see?

The answer to the question suggested is dependent upon the degree with which the major, in number, of the presumptions press upon and convince the judgment. Had the learned trial judge determined this vital matter of fact from an evidentiary standpoint, instead of disposing of the case upon the ground that, since the place of performance was Wisconsin, as matter of law the contract was a Wisconsin

contract, we might not disturb the decision; but, looking at the matter without the aid of an initial finding, it seems to us that the evidentiary circumstances, inconsistent with the presumption arising from the agreed place of performance, clearly overcome the latter and, therefore, that the contract ought to be held to be just what the parties evidently intended it should be; that is, a binding agreement; hence a Tennessee obligation.

It will be noted that we do not overlook the circumstance of the trial court having found the parties to have contemplated that the oral agreement would be reduced to writing. We take that in connection with the finding, in effect, that they purposed making a contract *in præsenti*. There is no finding that the parties merely negotiated for, but did not actually close a contract. On the contrary, the findings are, in substance, as already indicated, that they intended to make a contract *in præsenti* and to make evidence of it by a writing.

Counsel's argument that the fact as to the parties having intended to make a binding contract, should not be given any efficient evidentiary effect, is ingenious but, in our judgment, not very logical. It rests on the mistaken notion that the presumption arising from the agreed place of performance is a presumption of law; whereas, as we have said, it is a mere rebuttable inference of fact; or rests on the notion that, as a presumption of fact, it is of such forceful character as to be proof against any inconsistent presumption of less dignity than one of a conclusive character,—one equivalent to a presumption of law, which is not the case. It is efficiently rebuttable by any direct or circumstantial evidence clearly, though not necessarily conclusively, indicating the contrary. Counsel rely implicitly upon *International H. Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, but we do not find anything there affording ground for their confidence. In connection with the decision there as to the place of the con-

tract, in any particular instance being a matter of intention, it is made plain that an evidentiary presumption in respect to the matter, is efficient only so long as no other exists clearly inconsistent with it.

The question of intention is generally solved, and only solvable, by circumstantial evidence. In such a situation as we have seen here, if direct evidence were required to overcome the presumption arising from the agreed place of performance, the latter would be, in effect, a presumption of law, instead of one of fact, because of the practical impossibility of displacing it. The adverse presumptions here, arising from the acts of the parties, quite well illustrate the old maxim that "actions speak louder than words."

*By the Court.*—The judgment is reversed, and the cause remanded for judgment in plaintiff's favor.

TIMLIN, J. (*dissenting*). In this case the learned circuit court, after trial and hearing, found the facts to be that at Memphis, Tennessee, on July 15, 1909, the parties made an oral agreement whereby respondent agreed to sell to appellant and appellant agreed to buy 100,000 pounds Daisy cheese to be delivered in quantities demanded by appellant f. o. b. cars at Manitowoc, Wisconsin, up to March 1, 1910, storage charges in the meantime to be borne by the respondent. That it was also then and there agreed that this contract should be thereafter written out and signed, but this last was never done because respondent refused so to do. In August, 1909, and at other times, the appellant duly demanded shipments, the respondent refused, and the appellant bought the cheese on the market at the market price, and brings this action for the excess which it cost, *i. e.* $1,250. The total purchase price at the rate orally agreed upon in Memphis would have been $14,250. The oral agreement is valid under the laws of the state of Tennessee.

As conclusions of law the court found, *inter alia,* that the

agreement to deliver cheese f. o. b. cars at Manitowoc, Wisconsin, made that city the place where the title would pass and the place of performance by the respondent. That, in the absence of an agreement as to terms of payment, the law will imply a contract for cash on delivery, and it was a condition precedent to appellant's right of possession or right to insist upon delivery that it tendered payment to respondent at respondent's location at Manitowoc, Wisconsin, and that city is the place of appellant's performance. The validity of the agreement made at Memphis must be determined by the laws of Wisconsin, and the agreement was therefore void under the Wisconsin statute of frauds. The learned circuit judge gave judgment for defendant, thereby finding all inferences of fact or law deducible from the evidence in favor of respondent.

It has often been held that intention is a question of fact, and that great weight will be given to the decision of the trial court upon such questions, but this rule, while asserted at times in very strong language, appears to be weak in spots and is not consistently followed. *Szczepanski v. C. & N. W. R. Co.* 147 Wis. 180, 132 N. W. 989. My time will not permit the presentation of a critical review of cases bearing upon the conflict of laws. But the decision of the learned circuit court is supported by such learned commentators as the authors of 2 Mechem on Sales, § 1043, citing cases; 3 Ency. U. S. Sup. Ct. Rep. 1041, citing cases. I have examined the latter cases and think they support the text. See, also, cases cited on page 6 of respondent's brief, not the least of which is *International H. Co. v. McAdam,* 142 Wis. 114, 118, 124 N. W. 1042, where the learned justice who writes the majority opinion in this case says:

"The place of the contract is, generally speaking, a matter of mutual intention, but the intended place, as determined by legal presumption in some cases and evidentiary circumstances in others, settles all questions as to the legal test of validity and interpretation. Such presumption, in the ab-

sence of evidence to the contrary, is that the place of making and performance, in a physical sense, is the place in a legal sense, but the place of performance, when different from that of the actual making, is the place in such legal sense, subject to the presumption being rebutted by clear evidence of intention."

There are no evidential circumstances here tending to rebut such presumption unless it be that the parties are presumed to have intended a valid contract. To say that the presumed intention of the parties to make a valid contract is potent to overcome the inferences of intention arising from fixing the place of performance elsewhere is to eliminate the latter as a factor in all cases, because every one who seriously attempts to contract intends to make a valid contract. There is nothing else in the case upon which to ground the reversal of the judgment below. There is, however, the countervailing circumstances that the parties did not rest satisfied with the oral agreement at Memphis, but stipulated that this should be followed by and included in a written and signed instrument. There are other considerations relative to the statute of frauds suggested by *Emery v. Burbank,* 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57, and 2 Wharton, Conflict of Laws (3d ed.) secs. 690 to 695, but I forbear further comment.

I am authorized to say Mr. Justice KERWIN concurs in this dissent.

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STATE EX REL. WILLS, Respondent, vs. LARKIN and others, Supervisors, Appellants.

*January 13—February 3, 1914.*

***Highways: Laying out: Place of meeting of supervisors: Appeals: Proceedings on reversal:*** **Mandamus:** ***Evidence.***

1. **The mere fact that town supervisors, for shelter or convenience, met at a house ten or twelve rods from the mathematical point designated in the notice of their meeting to decide upon**

an application for the laying out of a highway, did not deprive them of jurisdiction, such place being in substantial accord with the notice.

2. One who, under sec. 1276, Stats., has appealed to a justice of the peace from the decision of town supervisors in the matter of laying out a highway, may subsequently, under sec. 1281, Stats., appeal to the county judge for the appointment of commissioners to review the determination of the commissioners appointed by the justice.

3. When the determination of town supervisors refusing to lay out a highway has been finally reversed by commissioners upon appeal, the supervisors have no further discretion in the matter, but must lay out the road; and in *mandamus* proceedings to compel them to lay it out, evidence as to the character of the country through which the road would pass, and as to the wishes of the people, is irrelevant.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The cause was submitted for the appellants on the brief of *J. W. Murphy,* and for the respondent on that of *S. E. Smalley.*

TIMLIN, J. The judgment appealed from awards a peremptory writ of *mandamus* to the supervisors of the town of Hazel Green, in Grant county, commanding them to lay out a highway therein described. On September 1, 1911, the relator, together with more than six other freeholders of the town of Hazel Green, made application in writing to the supervisors of that town to lay out the highway in question. On the next day the supervisors gave notice that they would meet at the southeast corner of the southwest quarter of the southeast quarter of section 1, town 1, range 1 west, being at the east end of said proposed highway, on September 25, 1911, at 10 o'clock in the forenoon of that day, and decide upon such application. They did meet at the time mentioned at a farm house ten or twelve rods from the corner mentioned and decided against the application. One of the petitioners within thirty days after such decision applied in

writing to a justice of the peace of an adjoining town for the appointment of commissioners pursuant to sec. 1276, Stats. Such proceedings were had thereafter that commissioners were duly appointed by the justice, and these commissioners after hearing the parties affirmed the order and determination of the supervisors, reduced such determination to writing, signed it, annexed it to their warrant, and on October 17, 1911, filed the same in the office of the town clerk of the town of Hazel Green. The same appellant then appealed from this determination within due time to the county judge of Grant county for the appointment of commissioners to review the decision of the former commissioners, the county judge appointed commissioners under and pursuant to sec. 1281, Stats., and these commissioners reversed the decision of the former commissioners appointed by the justice, and on the 8th day of November, 1911, reduced their decision to writing, signed it, annexed it to their warrant, and filed the same in the office of the town clerk last mentioned.

This petitioner made several requests upon the supervisors thereafter to proceed and lay out the highway pursuant to the decision of the last mentioned commissioners. The supervisors refused and neglected to lay out the highway. Two members of the town board retired and two others were elected in their places at the town meeting of April, 1912, and on April 27, 1912, this petitioner demanded of the new board, the present appellants, that they proceed to lay out the highway, which they refused, whereupon the relator, another of the petitioners, procured the alternative writ of *mandamus* which instituted this action. A motion to quash the alternative writ was denied, the appellants thereafter made return to such writ, and this return was treated as if it were at issue by answer or replication. Testimony was taken on such issue, consisting mostly of the records and files of the three several proceedings mentioned. The appellants of-

fered to show the character of the ground over which such proposed highway would run, the crossing of streams and the cost of opening the road and the necessity for bridges and the opinions of the people of the town of Hazel Green on the subject. But the learned circuit court held that all of this matter was for the commissioners and irrelevant to the question of the legal right of the relator to a peremptory writ of *mandamus.*

Error is assigned upon the grounds that the relator, having appealed from the decision of the supervisors to a justice of the peace to appoint commissioners to review that decision, was not entitled to a subsequent appeal to the county judge for the purpose of reviewing the determination of the commissioners; that the supervisors lost jurisdiction by failing to meet at the place designated in the notice of meeting to hear and decide upon the application; that the testimony offered to show the character of the country through which the proposed highway would pass and the cost of such highway and the desire of the people of Hazel Green with reference to laying out the highway was excluded.

In support of the first assignment of error it is contended that, construing secs. 1276 and 1281, Stats., together, it is apparent that the petitioner was given an election to appeal to a justice of the peace from the decision of the supervisors, or to the county judge, and having applied to a justice of the peace in the first instance, no subsequent appeal from the determination of the first commissioners can be entertained. We think this contention inconsistent with the decision in *State ex rel. Vos v. Hoelz,* 69 Wis. 84, 33 N. W. 597. These statutes have stood a long time on the statute books, and more than twenty-five years ago received the construction given them in the case mentioned, when it was considered that they called for distinct *quasi*-judicial determinations, not a series of appeals from the same decision, and this we

think inconsistent with the construction contended for by appellants in the instant case.

The mere fact that the supervisors sought shelter or convenience in a house ten or twelve rods from the mathematical point of meeting described in the notice could mislead no seeker in good faith for the place of meeting, and this place was in substantial accord with the notice.

The time to show the character of the country through which the road would pass and the wishes of the people of Hazel Green was when the commissioners met, and the tribunal to which such considerations should be offered was the commissioners. When the latter rendered and filed their decision such inquiry was closed, and the statute (sec. 1282) makes it the duty of the supervisors to lay out the road. They have no discretion in the matter at this stage of proceedings. *State ex rel. Curtis v. Geneva,* 107 Wis. 1, 9, 82 N. W. 550; *Williams v. Mitchell,* 49 Wis. 284, 290, 5 N. W. 798.

*By the Court.*—Judgment affirmed.

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LAYNG, Respondent, vs. STOUT and others, Appellants.

*January 13—February 3, 1914.*

*Landlord and tenant: Title to crops: Stipulation in lease: Validity: Estoppel: Sale by a lessee to purchaser with notice: Conversion: Receiving proceeds of sale: Appeal: Affirmance.*

1. A stipulation in a lease that title to the crops raised during each year on the leased premises shall vest in the lessor until such time as the rent shall have been paid, is valid.
2. The owner of personal property in possession of another may, by permitting the possessor to deal with it as his own, estop himself from asserting title against a *bona fide* purchaser; but that rule has no application where, although a lessee had

for several years been permitted to sell crops, receive the proceeds, and pay the rent therefrom, yet on the occasion in question, before the purchase was made, the purchaser had been advised of the lessor's claim of title and forbidden to purchase except upon condition that enough of the proceeds of the sale to cover the rent due be paid directly to the lessor.

3. In an action for the conversion of grain which, though belonging to plaintiff as the lessor of land, had been sold by her lessee, where it appeared that one of the defendants, with notice of plaintiff's rights, received and accepted from the purchaser of the grain, to apply upon an indebtedness of said lessee, a part of the proceeds of the sale which belonged and should have been paid to the plaintiff, a judgment against said defendant for the amount so received is affirmed upon appeal, although said defendant did not in fact convert the grain.

APPEAL from a judgment of the circuit court for St. Croix county: JAMES O'NEILL, Judge. *Affirmed.*

In August, 1906, the plaintiff and her husband, since deceased, leased a farm owned by the plaintiff to one Grimes for the term of five years from October 1, 1906. The lessee agreed to pay an annual rental of $300, to be paid from the produce raised on the farm. There was a slightly different provision made for the payment of rent during the first year from that relating to the subsequent years. As to the latter years, after reciting that the lessors should be entitled to proceeds derived from the sale of cream, the lease provided that the lessors "shall own, and sell in their own names, at such times as shall be selected by the party of the second part [the lessee], sufficient of the hay and grain grown on said premises in each of said years to pay the remainder of the rent due them on said premises for such year, after deducting the amount received by them for cream, as aforesaid, over and above the expenses which may be incurred by them in making each such sales, provided that the said times to be selected by the party of the second part for making such sale shall not be later than the first day of February following the summer in which such crops are grown."

The rent for the year ending October 1, 1911, was not paid and the tenant proceeded to sell a portion of the grain raised on the farm during the year 1911 to the New Richmond Roller Mills Company. The defendant *Stout* acted as buyer for this company and purchased the grain in question for it. There is substantially no dispute in the evidence which tends to and does show that *Stout* was advised by the plaintiff that she claimed to have the title to the grain raised on the farm or that she forbade *Stout* to purchase from the tenant except on condition that the proceeds derived from the sale of the grain be paid her up to an amount sufficient to pay what was due for rent. Neither is there any doubt that such claims were made known before the grain was purchased. Part of the proceeds of the sale was paid directly to the tenant. The tenant was indebted to the *Clear Lake Mercantile Company* for goods purchased at its store, and *Stout* was an officer of this corporation. He induced the tenant to direct the purchaser of the grain to pay $250 of the purchase price thereof to said *Mercantile Company*. Plaintiff brought an action for conversion against *Stout*, the *Clear Lake Mercantile Company*, and Grimes. At the close of the testimony the court directed a verdict against the *Mercantile Company* and its codefendants for $250 damages, and against Grimes and *Stout* for the additional sum of $8.85. These amounts with the sum paid on the sale of cream made up the $300 rental. *Stout* testified that in addition to the amount paid the *Mercantile Company* he paid other bills from the proceeds of the sale of the grain amounting to $49, and that in February, 1912, he delivered checks to Grimes for the balance due on the sale of grain, amounting to $222. Defendants appeal from a judgment entered on this verdict.

For the appellants there was a brief by *H. H. Dean* and *F. M. White*, and oral argument by *Mr. White*.

For the respondent there was a brief by *McNally & Doar*, and oral argument by *W. F. McNally*.

BARNES, J. A number of propositions are advanced by the appellants, and many authorities are cited to support them. We think the judgment appealed from is correct, and will simply state the reasons why we think so.

It is very evident that the parties intended to agree that the title to the crops raised during each year should vest in the lessors until such time as the rent was paid and that thereafter all interest of the lessors therein should terminate. There is nothing ambiguous about the lease. We are in the dark as to any valid reason why the parties might not make a legal contract to this effect. It is true that, as between landlord and tenant, in the absence of any express agreement to the contrary, the title to the crops ordinarily vests in the tenant. But where a landowner is about to lease his land, why may he not contract that the title to the crops raised thereon shall vest in the owner of the soil that produced them? It would seem to be entirely consonant with reason to so hold, and the authorities pretty uniformly do hold that such stipulations are valid. *Andrew v. Newcomb,* 32 N. Y. 417; *Smith v. Atkins,* 18 Vt. 461; *Bellows v. Wells,* 36 Vt. 599; *Whitcomb v. Tower,* 12 Met. (Mass.) 487; *Lewis v. Lyman,* 22 Pick. 437; *DeVaughn v. Howell,* 82 Ga. 336, 9 S. E. 173; *Durham v. Speeke,* 82 N. C. 87; *Fox v. McKinney,* 9 Oreg. 493. The rule announced in these decisions is approved in *Lanyon v. Woodward,* 55 Wis. 652, 656, 13 N. W. 863, and in *Rowlands v. Voechting,* 115 Wis. 352, 356, 91 N. W. 990. Counsel for appellants suggest that the case of *Andrew v. Newcomb, supra,* was overruled by *Rochester D. Co. v. Rasey,* 142 N. Y. 570, 37 N. E. 632. This is a mistake. The later case did not involve the relation of landlord and tenant, but the validity of a chattel mortgage given on crops not in existence, to a person other than the landlord. Instead of overruling it approved the earlier case.

It is said that for a number of years the lessors permitted the tenant to sell the crops and draw the money therefor and

pay the rent out of the proceeds, and that therefore the tenant made sale of the grain in 1911 with the knowledge and approval of the landlord and that plaintiff must pursue her remedy against him. It is well established that the owner of personal property in possession of another may permit the possessor to deal with it in such a way as to estop himself from asserting title against a *bona fide* purchaser. This rule of law has no application to the instant case, because all of the defendants were chargeable with knowledge of the rights of the plaintiff. While the New Richmond Roller Mills Company might purchase the grain, it acted at its peril when it paid any one therefor except the plaintiff until her claim was satisfied. The *Clear Lake Mercantile Company* had no right to the proceeds of this sale as against the plaintiff and accepted the same with notice of her claim thereto. It may well be doubted whether it could be said that this latter corporation converted the grain. If it converted anything, it would seem to be the money derived from the sale of the grain. But all of the facts in reference to the transaction were before the court, and there is no dispute as to the material facts. They show that this defendant received $250 which belonged and should have been paid to the plaintiff, and that all of the defendants were clearly liable for the amounts adjudged against them. There being no error in the pleading or procedure which affected the substantial rights of the appellants, the judgment should be affirmed under sec. 3072*m*, Stats.

*By the Court.*—Judgment affirmed.

CASHMAN, Appellant, vs. Ross and others, Respondents.

*January 13—February 3, 1914.*

***Wills: Construction: Life estate: Vesting of remainders: Future division among a class: Partition: Who may maintain.***

1. Where a testator devised lands to his wife during her life and directed that "after her death the said property to be divided equally between my children," no interest or estate vested in the remaindermen until the death of the life tenant.
2. In such case, where a daughter of the testator died before the widow, the devise to such daughter lapsed and her heir could not, after the death of the widow, maintain an action for partition against the surviving children of the testator.
3. Under sec. 3101, Stats., the estate or interest in lands which will entitle a person to maintain an action for partition must be presently vested in him.
4. When property under a will is to be divided at a specified time in the future among a class, only those thereof who are alive at the time of division can take under the will in the absence of provisions to the contrary.

TIMLIN, J., dissents.

APPEAL from a judgment of the circuit court for St. Croix county: JAMES O'NEILL, Judge. *Affirmed.*

Action for partition of real estate. Plaintiff alleges that he is a tenant in common with the defendants in certain described lands and, as such, prays for a partition thereof. The evidence shows that in 1882 one Mathias Ross was the owner of the lands in question and that he then made a will reading, "I hereby give and bequeath to my wife, Katie Ross, all my real and personal property (after the payment of my just debts) to have and to hold during her natural life. After her death the said property to be divided equally between my children." He died shortly after executing the will, and it was admitted to probate July 5, 1882. Katie Ross, his widow, died intestate June 16, 1910. In September, 1905, Margaret Ross, who was a daughter of testator, married

plaintiff, and in October, 1905, she died, without issue, leaving plaintiff her sole heir. At the close of plaintiff's evidence the court granted a judgment of nonsuit, and the plaintiff appealed.

*Spencer Haven,* for the appellant.

For the respondents there was a brief by *McNally & Doar,* and oral argument by *W. F. McNally* and *W. T. Doar.*

VINJE, J. The sole question presented by the appeal is whether or not under the will set out in the statement of facts any estate or interest in the lands vested in Margaret Ross at the death of the testator or before the death of the life tenant, Katie Ross. If an estate or interest vested in her, then plaintiff, as her sole heir, is entitled to maintain the action. On the other hand, if no interest or estate vested in the remaindermen until the death of the life tenant, then plaintiff, since his wife, Margaret, died before the life tenant, has no interest in the lands, and cannot maintain partition. Sec. 3101, Stats. 1913, provides that an action of partition may be maintained "by any person who has any estate in the lands of which partition is sought." This means that he must have some interest in the lands that has vested prior to the commencement of the action. It is not sufficient that such an interest may vest in him in the future. See *Greeney v. Greeney, post,* p. 621, 145 N. W. 201, and cases cited. The question must be solved, primarily, by the language of the will itself. If the intention of the testator is clear as to when the estate vests, the statute relating to the vesting of estates cannot affect it. *Moran's Will,* 118 Wis. 177, 193, 96 N. W. 367. The will of testator contains no words of present gift or devise to the children. It creates a life estate in the wife and then directs that upon the termination of such estate, that is, after her death, the property is to be divided equally between his children. Respecting the pre-

cise question here presented the court in *Moran's Will, supra,* said:

"But where there is a precedent life estate, and the devise or bequest is not direct to those who are to take in remainder, leaving the period of enjoyment to commence only after the termination of a precedent life estate, but the bequest or devise is in the form of a direction or an expressed purpose that at the termination of the precedent estate the property shall be divided between certain persons specified, that circumstance is held to effectually displace the presumption as to immediate vesting, and create the presumption, nothing appearing clearly to the contrary, that the intention of the testator was that the estate in remainder should not vest until the time for division and distribution should arrive." See pp. 196, 197, and cases cited.

The devise in the instant case meets the conditions of this language. It is not a present devise to the children. It is a direction that after the termination of the life estate the property shall be divided between them, and nothing appears in the will to indicate that any vesting of interest shall precede the right to the enjoyment of the estate.

When property under a will is to be divided at a specified time in the future among a class, only those thereof who are alive at the time of division can take under the will in the absence of provisions to the contrary. *Moran's Will,* 118 Wis. 177, 199, 96 N. W. 367; *Matter of Baer,* 147 N. Y. 348, 41 N. E. 702. We have no provisions in this will disposing of the share of a remainderman who dies before the life tenant. The devise, therefore, to Margaret Ross lapsed upon her death prior to that of her mother, and her share went to the other children of the testator who survived and not to her husband. The court properly granted a nonsuit.

*By the Court.*—Judgment affirmed.

TIMLIN, J. (*dissenting*). The will in question, in the most simple, straightforward way, gave a life estate in the property in question to testator's widow. This is followed

by the simple and direct words: "After her death the said property to be divided equally between my children." There are no other indications of the intention of the testator. I do not think it conforms either with the intention of the testator or to the statutes to hold that these remainders to the testator's children did not vest at the death of the testator, subject only to the life estate of the widow. If he had not mentioned the children at all, but simply devised a life estate to the widow, it could hardly be claimed that each child did not take a vested interest. Is it rational to hold that this is defeated by the direction that "after her death the property is to be divided equally between my children?" It is reiterated in decisions of this court that the intention of the testator must prevail, but an artificial test of intention is here applied which I think tends to defeat the true intention, and the subject left in such confusion that titles are shaken and wills rendered very uncertain. In *Cowley's Will,* 120 Wis. 263, 97 N. W. 930, 98 N. W. 28, there were two successive life estates, and the remainder was disposed of in the following words: "such portion of my said estate as shall remain shall be equally divided between my lawful heirs." Held, that this word "heirs" referred to those persons who at the testator's death would by law have been entitled to inherit his intestate estate and not to those who were his heirs at the death of the last life tenant. If that case and the present case stand, there must be quite a difference in the use of the words "my children" and "my lawful heirs" in a case where the children and the lawful heirs are the same persons.

In *Smith v. Smith,* 116 Wis. 570, 93 N. W. 452, the will was substantially like that in the instant case; that is, it created a life use and then provided, "and at the time of her death to be equally divided between these four children," naming them. It was held that the bequest to these four vested in interest at the death of the testator. It is said that

there the names of the children were given, here they are not; but I do not think that a valid ground of distinction, nor would it occur to a mind not predisposed to find distinctions, nor to a testator making his will. I think the will in *Burnham v. Burnham,* 79 Wis. 557, 48 N. W. 661, is in legal effect and substance, in so far as the question here up for consideration is concerned, like the will in the instant case.

The statute, sec. 2037, says future estates are either vested or contingent. If I understand the decisions they say that such estates may be vested and contingent. *Moran's Will,* 118 Wis. 177, 96 N. W. 367. The statute (sec. 2037) says estates are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate, while they are contingent (omitting events) only when the person to whom they are limited to take effect *remains* uncertain. The decisions say sometimes that the estate is vested, that it is not vested, and sometimes that it is vested subject to be divested under such circumstances when the statute declares the estate vested. An estate vested in interest but not in possession remaining after a life estate may be subject to be divested by the happening of a condition subsequent like any other title, but surely this does not affect its vesting under the statute. The *Moran Will Case,* 118 Wis. 177, 96 N. W. 367, is cited with apparent confidence by the appellant and respondents. It might be well to notice that the opinion there seems to argue in one direction and decide in another. There were in that will express words of survivorship, but the question related to the children, not to Julia Dolan, and was whether the survival there mentioned referred to the death of the testator or to the death of his wife, the life tenant. It is said: "The decision was in favor of the former. The losing parties thereupon appealed to the circuit court, where they prevailed, judgment being rendered accordingly, from which this appeal is taken." That would make it ap-

pear that the county court decided that the words of survivorship referred to those who survived the testator. The circuit court decided that it meant those who survived the life tenant and the latter judgment was reversed by this court, although the argument contained in the opinion, and I may be pardoned for saying it is for the most part *obiter,* is wholly the other way. An examination of the record will disclose that the county court decided that the words of survival referred to the death of the life tenant, the circuit court reversed this, holding they referred to the death of the testator, and this court reversed the judgment of the circuit court and sustained that of the county court.

Without prolonging this dissent I merely wish to say that the will before the court is, in my opinion, in legal substance and effect like the will in *Burnham v. Burnham,* 79 Wis. 557, 48 N. W. 661; *Smith v. Smith,* 116 Wis. 570, 93 N. W. 452; and *Cowley's Will,* 120 Wis. 263, 97 N. W. 930, 98 N. W. 28; and the word "divide," when applied to real estate and among the children of testator, has no such natural or usual meaning as is here attempted to be given to it. The rule of this case is highly artificial and neither carries out what appears to me to be the intention of the testator nor conforms to the statute.

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WISCONSIN CENTRAL RAILWAY COMPANY, Appellant, vs. SCHUG and wife, Respondents.

*January 13—February 3, 1914.*

*Vendor and purchaser of land: Description: Certainty: Statute of frauds: Breach of contract: Existing railroad right of way.*

1. A land contract which does not specifically describe the land to be conveyed, but refers to it in such terms that by the aid of the facts and circumstances surrounding the parties at the time the court can with reasonable certainty determine the

land which is to be conveyed, satisfies the statute of frauds in this regard and may be enforced.

2. A contract to convey land is not breached by reason of the existence of a railroad right of way over it, if the right of way be either in actual use or so prepared for use that its existence and purpose are obvious and unmistakable.

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Reversed.*

Action for specific performance of a land contract. The facts were as follows: May 24, 1910, the defendants, in consideration of $5 then paid by the plaintiff, granted in writing to the plaintiff the right to purchase within thirty days thereafter, if it should so elect, a certain specifically described parcel of land over which the plaintiff's right of way was already staked out, in consideration of $695 to be paid on delivery of the deed, and "a deed of conveyance of those certain tracts of land which the said railway company is to acquire from William Schug and George Wickenhauser." Both parties knew what these last named tracts of land were; they were exactly delineated on a map which was before the parties. The contract further provided that the company might at once enter on the land and construct its railroad, and contained certain further provisions as to grade farm crossings which the company was to furnish. It was contemplated by the parties that the acceptance of the option should be by mail. On June 23, 1910, a written acceptance of the option was mailed to the defendants, but not actually taken from the mail box and read by them until June 25th. Subsequently the defendants declined to execute a deed of the land although the full amount of the optional price was tendered and deeds of the parcels of land referred to in the contract which were to be acquired from William Schug and George Wickenhauser. Over one of these parcels a railroad right of way existed which had been staked out and nearly or quite graded when the contract was made, and this fact also was known to the

defendants. The circuit court concluded from these facts that the plaintiff company had fully complied with the contract and would be entitled to a conveyance from the defendants except for the fact that the contract was void under the statute of frauds because there was not a proper description or identification in the instrument of the lands which the plaintiff company was to deed to the defendants as part of the consideration of the land in question. The complaint was therefore dismissed and the plaintiff appeals.

*Spencer Haven,* for the appellant.

For the respondents there was a brief by *McNally & Doar,* and oral argument by *W. F. McNally* and *W. T. Doar.*

WINSLOW, C. J. In this case it is held:

1. A land contract which does not specifically describe the land to be conveyed, but refers to it in such terms that by the aid of the facts and circumstances surrounding the parties at the time the court can with reasonable certainty determine the land which is to be conveyed, satisfies the statute of frauds in this regard and may be enforced. *Messer v. Oestreich,* 52 Wis. 684, 10 N. W. 6; *Docter v. Hellberg,* 65 Wis. 415, 27 N. W. 176; *Inglis v. Fohey,* 136 Wis. 28, 116 N. W. 857.

2. A contract to convey land is not breached by reason of the existence of a railroad right of way over it, if the right of way be either in actual use or so prepared for use that its existence and purpose are obvious and unmistakable. *Smith v. Hughes,* 50 Wis. 620, 7 N. W. 653.

*By the Court.*—Judgment reversed, and action remanded with directions to enter judgment for specific performance as demanded by the complaint.

BOARDMAN, Administrator, Respondent, vs. LORENTZEN, Appellant.

*January 13—February 3, 1914.*

*Conveyances: Fraud: Undue influence: Degree of proof required: Presumptions: Burden of proof: Right to dispose of property as against heirs: Evidence: Sufficiency: Witnesses: Competency: Husband and wife: Appeal: Findings of fact based on misconception of law.*

1. He who obtains property by will or otherwise through undue influence or consciously taking advantage of incompetency of the owner, commits a fraud of most serious character.
2. The common rule as to certainty of the existence of facts constituting fraud, applies, emphatically, in case of the wrong being that of obtaining property by undue influence or taking advantage of incompetency of the owner,—such facts are required to be established by clear and satisfactory evidence.
3. In a controversy as to whether property was obtained by undue influence, there is an evidentiary presumption in favor of the person charged, the same as in all cases sounding in fraud, that he did not perpetrate the wrong.
4. The charge of obtaining property by undue influence may be circumstantially, *prima facie*, established; but that requires these essentials: proof of a subject unquestionably susceptible to undue influence and clear and satisfactory evidence of opportunity to exercise such influence, a disposition to exercise such influence, and indication that it was in fact exercised.
5. Upon a *prima facie* case of undue influence having been circumstantially or otherwise established, there is no shifting of the burden of proof upon the accused more than in any other case where plaintiff's evidence, unexplained or uncontradicted, would entitle him to judgment.
6. In case of a charge of obtaining property by undue influence, *prima facie* or otherwise established, the defendant must meet such *prima facie* case to such extent, at least, that there is no longer clear and satisfactory proof of the facts constituting the charge of fraud.
7. The common evidentiary presumption in favor of judicially found facts does not exist where such findings are the result of misconception of law.
8. A person, however old, so long as he retains appreciation of his possessions and relations to others, may dispose of his prop-

erty in any lawful way he sees fit, and regardless of whether his children or any one else may be pleased therewith.

9. The heirs at law of a person have no right to his property, except subject to his pleasure,—he is not bound to consult them or be influenced by their wishes, nor have they any right in the matter except that he be left free to exercise his own will.

10. A person having acted in the exercise of his right to dispose of his property upon his own judgment, it is not within the judicial function to disturb such disposal or do otherwise with reference thereto than to conserve his intention.

11. If a person makes a disposition of his property in contemplation of death and survives for a considerable period thereafter in such mental condition as to appreciate what he has done, and gives no sign that such disposition was not his free intelligent act, such circumstances are strongly evidentiary of a disposition free from undue influence or incompetency.

12. A married woman, by direction of her husband, having written a letter to another, she is competent to prove the contents of such letter in case of that being material in a judicial investigation and satisfactory excuse being given for not producing the writing.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Reversed.*

Action to set aside a conveyance of property on the ground of fraud. The issues tried are indicated by the following abridgment of the decision: December 26, 1907, Jacob Svenson, deceased, a man about seventy-eight years of age and possessed of $3,125 in personal property, for a promise on the part of defendant and his wife to care for him during the rest of his life, transferred the same to him. Mr. Svenson was incompetent to make such a contract. He was induced to make it by undue influence on the part of defendant and his wife. They performed services on the faith of such contract of the reasonable value of $500. Plaintiff, as personal representative of deceased, is entitled to judgment declaring said transfer void and that he recover the value of the

property involved, less the value of the services actually rendered therefor, with costs. Judgment was so entered.

The findings were based on evidence more or less conflicting, supposed to indicate these circumstances: Mr. Svenson was somewhat feeble around about the time of the transaction in question and somewhat childish, impaired in memory, and much reserved in manner as compared to his habits prior thereto, particularly up to the time of the death of his wife in 1903. He had several children and, prior to the transfer, expressed an intention to treat them equally in disposing of his property. He gave all to defendant and his wife, placing the title in defendant's name. Two persons outside of the latter's family were procured to be present at the time of the transfer. One of such persons was a Mr. Anderson,—cashier of a bank in a near-by village who acted as legal adviser,—and the other was a neighbor who was asked to be present as a witness. The presence of these two persons was directly procured by the defendant. None of Mr. Svenson's children, except defendant's wife, was present during the transfer. Mr. Svenson had four children,—Sievert who resided some few miles distant from defendant's home and had not lived with his father since he was thirteen years of age, absence from the paternal home being more than twenty-five years,—another son who resided in a distant place and had been away from his boyhood home over twenty-four years, a daughter who also resided in a distant place, and the defendant's wife. The latter was the youngest child. She lived with her father until after she was married and her mother died and perhaps a short period thereafter. Before the death of Mrs. Svenson she and her husband, or the latter, had some thought of the family property being conveyed to their youngest daughter, or to her husband, or both of them in consideration of an agreement for permanent support. None of the children, except defendant's wife, had paid any particular attention to the father for years before the particular transaction, and

neither of them were so circumstanced as to need any assistance from him. There were these undisputed facts: Mr. Svenson owned a small farm and transacted his own business and possessed and cared for his own property up to the time of the transfer to defendant. He had lived with the latter and his wife some little time before such transfer. He lived with them, contentedly, and was cared for by them, properly, and without any attention being paid to him by any of his other children, except Sievert, and no attention by him in particular, for considerably over a year. All of the time, except the latter part thereof, he remained in about the same mental condition as at the time of the transfer. At such time the business was done deliberately, some two hours being occupied in the transaction. Mr. Svenson gave all directions as to what should be done and was very emphatic about the matter. Neither defendant nor his wife made any suggestion favorable to themselves. Both advised the old gentleman to give part of his property to his absent children. He knew all about his property,—appreciated what it consisted of and the amount of it. Nothing was said or done in the year after the transaction, during all of which time his mental condition did not greatly change, showing dissatisfaction with what he had done. In addition to the undisputed evidence that Mr. Svenson thought of turning his property over, as stated, before his wife died to secure future support, there was evidence strongly tending to show that he thought of doing so shortly before and shortly after he went to live with defendant and his wife, or to transfer the property to some institution for the care of the aged to secure permanent support and care, and that Sievert was informed of that fact for the purpose of having him express his opinion in respect thereto, and that after the transfer Sievert was informed thereof and made no objection thereto. The old gentleman did his own business and kept it entirely within himself up to the time of the transfer. He lived on his farm for some

four years after his wife died. For a short time a sister resided with him. Much of the time he resided alone. When he tired of that he endeavored to arrange with a neighbor to whom he was accustomed to let his farm, to afford him a home; but upon the neighbor declining to name what he would charge for the service he turned to defendant and his wife. He made a pretty shrewd arrangement with them for his board and adhered to it until it was suggested to him by Sievert that he should pay a little more. He paid for his board, so far as appears, in a business way up to the time of the transfer and manifested a desire to pay for any service rendered, or which might be rendered him.

*Spencer Haven,* for the appellant.

For the respondent there was a brief by *McNally & Doar,* and oral argument by *W. F. McNally* and *W. T. Doar.*

MARSHALL, J. Were the conclusions of fact reached by application to the case of correct legal principles? Upon surveying the evidence in connection with the treatment of it in the opinion, filed by the learned judge before whom the case was tried, we are strongly impressed with the idea that he was efficiently influenced by a wrong notion of the law.

There is an absolute absence of any direct evidence that appellant or his wife, by act or word, ever suggested to Mr. Svenson the idea of his conveying his property to them or either of them, or that they influenced him to reside with them, or that they ever interfered with his property or business affairs in any way whatever. On the contrary, as indicated in the statement, the direct evidence, and circumstantial as well, is to the effect that Mr. Svenson had his own way with his property up to the time of the transfer, did his own business, without soliciting or taking or receiving advice from any one, with perhaps the exception that defendant aided him somewhat at the time he sold the farm, all the transactions in respect to which are admitted to be beyond suspicion,

and did not, by act or deed, show any dissatisfaction with the transfer to the defendant for the year afterwards, during which time, the evidence strongly tends to prove, he had sufficient mentality to appreciate the whole matter.

In view of the situation stated, some light is thrown on the manner in which the result was reached by observing that the trial judge indulged in the idea, for which there is some basis in the early decisions here, but which the court of late has endeavored, time and again, to correct, that upon a *prima facie* showing being made in a case of this sort, there is a shifting of the burden of proof to the side of the defendant, requiring him, in order to prevail, to prove affirmatively to a reasonable certainty, that the transaction was the free, voluntary, intelligent act of the deceased. That is all wrong. This court has said so in *Small v. Champeny,* 102 Wis. 61, 78 N. W. 407; *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939; *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220; *Ball v. Boston,* 153 Wis. 27, 141 N. W. 8; and other cases.

It is unfortunate that trial courts now and then, cling, seemingly, to the idea of the shifting of the burden of proof in such cases, and in that way take a wrong view of the evidence. There is no more shifting of the burden of proof in this class of cases than in any ordinary case where the plaintiff by evidence in chief succeeds in making out a *prima facie* case. The burden of proof rests with him from the beginning to the end. The only distinguishing characteristic of the particular class is this: the court has held that some circumstances are sufficient to so lift the burden as to call for rebuttal. But all the defendant need then do is to produce sufficient evidence to so weaken plaintiff's case, that the circumstantial and other evidence in his behalf no longer establishes the fraud charged with the requisite clearness to warrant a decision in his favor. That is to say, a *prima facie* case, circumstantially made against the defendant, does not require him, in order to defeat it, to prove affirmatively that

the act challenged was free from any fatal taint, as if he were the plaintiff holding the burden of proof and required to so establish facts. The charge against the defendant in such a case as this, in effect, accuses him of having perpetrated a fraud of a serious nature. There is a strong presumption in his favor against such wrong doing, which persists to the end of the litigation unless overcome by circumstances inconsistent therewith, established by clear and satisfactory evidence. *Ball v. Boston, supra.*

The presumption mentioned exists in all cases where fraud is charged. This court said in *Winn v. Itzel, supra,* referring particularly to the decisions giving rise to the idea that there is a rule peculiar to this class of cases as regards the "shifting of the burden of proof:"

"We do not understand that the principle there approved changed the practice in fraud cases, or affected the order of the trial of such cases. Parties who charge fraud must prove fraud after as well as before that decision. They still have the burden of proof. . . . When the plaintiff makes a *prima facie* case, entitling him to relief if the proof stops there, the defendant must take up the burden and meet the case so made by other evidence. This is the case in all contests of fact."

Former decisions in this class of cases were not intended to go further than to announce what facts should be considered as *prima facie* proof of fraud requiring explanation by the defendant. With a view to making what was thought to have been plainly decided in *Winn v. Itzel* and other cases, unmistakable, this was said in the late case:

"Thus it will be seen, in a case of this sort, upon a *prima facie* case being circumstantially made calling upon the person charged with fraud to explain his conduct, there still stands the presumption against wrong doing, eclipsed for the time being by the adversary presumption, but, subject to be efficiently aroused by affirmative evidence, direct or circumstantial, so satisfactorily explaining the adversary circumstances that they no longer seem to exist by clear and satis-

factory evidence. In the end, upon the whole case, the circumstances from which the alleged undue influence is inferable as matter of law must stand upon such evidence. That is, the burden being upon the one charging undue influence, from first to last, to establish it by clear and satisfactory evidence, the rule goes to the existence of the circumstances; the effect of the circumstances is matter of law. Weaken the case as to any one of the vital major incidents so that it can no longer be said to exist by clear and satisfactory evidence; then the *prima facie* case once created is so far rebutted that the plaintiff cannot successfully stand thereon, but must go further." *Ball v. Boston,* 153 Wis. 27, 37, 141 N. W. 8.

There is another important feature of the trial court's logic which seems to be contrary to the settled doctrine of this court. It is suggested that this court has never laid down any particular conditions which must be proved in a case of this sort; but, on the contrary, it has been decided that it is impossible to formulate a precise rule by which to decide the facts in all cases, citing *Winn v. Itzel, supra,* and drawing the conclusion therefrom that affirmative proof of a disposition to exercise undue influence is not vital. The trial judge seems to have overlooked the fact that in the *Winn Case* after the treatment upon which he relied, this rule, laid down in *Fox v. Martin,* 104 Wis. 581, 80 N. W. 921, and many times since reiterated, particularly in *Loennecker's Will,* 112 Wis. 461, 88 N. W. 215, was approved:

"There must be shown a subject unquestionably susceptible to undue influence, either as the result of old age, mental weakness, or both; also some clear evidence of opportunity, and a disposition on the part of the beneficiary to exercise such influence,"

in order to raise the presumption of such exercise and call upon the defendant to so far weaken it, at least as to destroy efficiency to establish the ultimate fact.

It must follow that to warrant such a result as was reached here as to undue influence, the fact of susceptibility to such influence must be left at the end of the trial unquestionably

established, and the disposition to exercise such influence established by clear evidence. Those terms have been so repeatedly used in the decisions of this court as to clearly make a rule on the subject involved.

The very nature of such cases as this indicates the prime essential to a recovery. It is grounded on fraud, and fraud of a very serious character. *Will of Slinger,* 72 Wis. 22, 37 N. W. 236; *Small v. Champeny,* 102 Wis. 61, 78 N. W. 407; *Ball v. Boston,* 153 Wis. 27, 141 N. W. 8; *Gordon v. Burris,* 153 Mo. 223, 54 S. W. 546; *Grove v. Spiker,* 72 Md. 300, 20 Atl. 144. This court, speaking of the wrongful act, said in *Will of Slinger:*

"Manifestly it is a subtle species of fraud, whereby mastery is obtained over the mind of the victim by insidious approaches, seductive artifices, or other species of circumvention;"

and in *Ball v. Boston, supra:*

"It is, really, one of the most reprehensible of deceptions because of the cunning, insidiousness, and artifices of seduction, which, in general, characterize it, and by means of which the unsuspecting victim is rendered powerless to carry out his own wishes or resist those of the wrongdoer."

Now if the basic feature of the case is fraud, and fraud in a high degree, and therefore particularly inconsistent with the general presumption against wrong doing, why does not the ordinary rule of clear and satisfactory evidence, in cases dependent on the establishment of fraud, apply,—not only apply, but quite emphatically? Generally, the more serious the nature of a wrong the stronger is the presumption of innocence of it, so the higher the degree of certainty required to overcome it. So, in ordinary cases, proof of the facts to a reasonable certainty is sufficient. In cases sounding in fraud, proof of the facts with that degree of certainty is required, emphasized by the call for clear and satisfactory evidence; and where the wrong is of such serious nature as to

involve the commission of an offense against the public, the degree of certainty must be such as to leave no reasonable doubt. How then can we escape the conviction that a charge involving such a subtle species of fraud as the robbery, so to speak, of a person by "insidious approaches, seductive artifices, or other species of circumvention,"—the deliberate act of singling out a victim for impoverishment and, by such reprehensible means as indicated, rendering him powerless to carry out his own wishes or resist those of the wrongdoer,—in order to prevail must be established by clear and satisfactory evidence? If that term has not been used so as to make plain the pathway of the trial judge and the logic of the decisions here, I am utterly unable to see why it is inappropriate; moreover, is not entirely appropriate. It was used either in words or effect before *Ball v. Boston.* I think it is the logical, necessary deduction from many decisions on the subject.

I enlarge upon the matter above discussed because I believe that such an important feature of the law should not be left in any degree of uncertainty. In *Ball v. Boston,* after referring to many cases at home and abroad on the subject, it was said advisedly:

"Thus it will be seen, in a case of this sort, if there is failure to appreciate that the gist of the attack upon the will is fraud, and the rule applies that he who alleges fraud must establish it,—not by a preponderance of, but by clear and satisfactory evidence,—the finding as to the vital fact is liable" to be wrong because of having been reached without proper legal guidance.

Probably the logical result of classing obtaining property by the exercise of undue influence with wrongs sounding in fraud, so that cases depending upon proof of such a wrong should be tested by the common rule on the subject, was first definitely stated in *Ball v. Boston;* but special reference was there made and is here repeated, to the fact that the first

prime essential,—a subject susceptible to undue influence,—must be unquestionably established, and the other two, viz.: opportunity and a disposition to exercise undue influence, must be established by clear evidence. It seems that a fact cannot be unquestionably established without being established by clear and satisfactory evidence, nor the other two essentials by clear evidence, without that including clear and satisfactory evidence. So it was said in *Ball v. Boston:*

"The burden being upon the one charging undue influence, from first to last, to establish it by clear and satisfactory evidence, the rule goes to the existence of the circumstances. The effect of the circumstances is matter of law."

That the trial court did not understand the law as above indicated, becomes quite clear by testing the findings of fact by the evidence, and is rendered unmistakable by language found in the opinion. What else can the suggestion mean to the effect that this court has not laid down any precise conditions essential to the finding of efficient undue influence in a case of this sort, in face of the fact that several conditions have been held, time and again, to be vital? Furthermore, what else can the statement by the learned judge mean, to the effect that this court has not laid down, as a rule, that there must be affirmative proof of disposition on the part of the beneficiary to exercise such influence? We must assume that the trial judge did not mean by the term "affirmative proof," direct evidence, but did mean that the suggested disposition on the part of the beneficiary to exercise undue influence, need not be affirmatively established; or in other words, established by a preponderance of the evidence. The word "affirmatively" is somewhat ambiguous, but where used in the particular connection in question, it has been held to convey the idea of evidence establishing the fact in dispute by a preponderance of the evidence. *Hendrickson v. Wis. Cent. R. Co.* 143 Wis. 179, 122 N. W. 758, 126 N. W. 686.

Further, after suggesting that no particular essential cir-

cumstances need be established in a case of this sort, and that affirmative evidence of disposition to exercise undue influence is not necessary, in all cases, the learned court expressed the opinion that "cases might arise—and I believe this to be one—where the situation is such that there would be an inference of fraud, even though there was no express testimony of disposition on the part of the beneficiary to do a wrongful act." Thus making plain that this case was not decided upon the theory that there was clear evidence, affirmatively establishing a disposition on the part of appellant, or any one acting for him, to exercise undue influence. True, the term "affirmative evidence" was used in one place, and the term "express evidence" in another; but it seems quite plain, the judicial idea was that "a disposition to use undue influence" need not, in all cases, grounded on that species of fraud, be established affirmatively; that is by clear and satisfactory evidence, and that this particular case is one of the exceptions.

In view of the foregoing, it is considered that the trial court, in reaching a conclusion, did not deem it material to find that Mr. Svenson was unquestionably susceptible to undue influence, nor that a disposition on the part of appellant to exercise such influence should be, or was, established, even to a reasonable certainty. In other words, that evidence persuasively tending to show the alleged victim to have been susceptible to undue influence, and something not answering at all to the call for clear evidence of a disposition on the part of the beneficiary to exercise undue influence, is sufficient in exceptional cases such as this.

Thus, in three material respects the decision complained of, is characterized by misapplication of law to evidence. That, necessarily, greatly, if not entirely displaces the presumption which, in general, renders judicially found facts immune from efficient attack, and requires us to go to the evidence and endeavor to determine, from an original standpoint, whether it warrants the conclusions which are challenged.

The requirement that there must be evidence showing a subject unquestionably susceptible to undue influence bears strongly, if not vitally, on the element of incompetency, since, in general, one could hardly be the former without being the latter, nor be the latter without being the former. Moreover, one to knowingly become enriched by dealing with an incompetent person, to the impoverishment of the latter, would be guilty of a fraud, akin to one, if not actually, characterized by undue influence.

Now, where is the evidence showing that Mr. Svenson was unquestionably susceptible to undue influence when the transfer was made to appellant, or was unquestionably or clearly incompetent? After reading the evidence in the record with all the care we can bestow upon it, we cannot answer that question. There may be evidence, direct or circumstantial, or both, affording fair ground for suspicion as to existence of the vital weakness; but that would be the limit.

The burden of proof being on respondent in respect to the matter, it was necessary for him to produce evidence of a substantial, forceful, and convincing character and which possessed that character in the face of the adverse proof, in order to warrant a finding in his favor. The evidence indicates that Mr. Svenson possessed characteristics common to men of his age and station who, having permanently laid aside all thought of taking further part in the activities of life to earn the means essential to care of themselves and family, in contemplation of inactivity for a few years and then death, may settle, or practically so, upon a plan for their remaining years, and are merely waiting for the last call, yet have retained full control of their property and business. Such little circumstances, in such a situation, as waiting to be spoken to upon neighbors calling, especially in case of difficulty of hearing, if characterized by a prompt and intelligent response, as is quite clearly established here was the case, notwithstanding some little evidence to the contrary, weigh

very light. And so with the circumstance of being a little childish,—as that term is commonly used by young or middle-aged persons, in speaking of old people who have gotten into the period and condition sometimes spoken of as second childhood; that is where one, on account of age, has lost the assertiveness and self-helpfulness of former days,—so long as there is still full appreciation of surroundings and possessions and the individuality requisite to take care of one's property and business. And so with evidence of such circumstances as occasionally forgetting names, or faces, or confusion as to just the way to return home upon being absent therefrom, so long as there still remains, as in this case, up to the time of the transfer, capacity to conduct ordinary individual business and such capacity is exercised. The fact that the deceased gave his property to appellant, as representative of his daughter, to whom he evidently was more affectionately attached than any other of his children, instead of dividing it between all, has nothing unnatural about it, when viewed in the light of all circumstances bearing on the transaction. He had a right to do with his own what he had a mind to. His children had no rights in the matter at all, except to have him left free to act intelligently upon his own judgment and without coercion. They were specially interested in that regard, but the right, in general, was no greater as to them than to society at large. There is the high place, in contemplation of the fundamental principles of civil life, which the right of individual liberty to dispose of one's property by contract or will,—holds. It is not the business of courts to undo what an old person may have done with his property, because of judicial notions of propriety or moral obligation, in a case of this sort, or the wishes of relatives, however deserving. Did the man do freely what he wanted to do and was competent to decide upon? Those are the sole questions. They being answered in the affirmative, it ends the matter, whether the disposition be such as would seem to have been the best

from a business or moral standpoint, or not. Such situations should not be so dealt with as to render it impossible, or even difficult, for an old person, circumstanced as Mr. Svenson was, to freely contract for support and care for the remainder of his days and for a decent burial at last, or render it unsafe to contract with him in respect thereto. Certainly, there is no more legitimate or commendable way for an old person to use the small fund accumulated by a long life of industry, than to devote it to securing proper care and support in his last days and the proper disposition of his remains at the end.

The amount of property here was not large. It was no more than an old man, circumstanced as deceased was, might well consider he could afford to give to be able to live in comfort,—free from all care, with every reasonable requirement for his welfare, the balance of his days, provided,—under the roof of a daughter whom he loved and who loved him and between whom there were relations, special, as regards his other children, and be assured a decent burial at the end. Especially is that so, in view of the fact that his other children, except one, were far away, had been absent for many years, had family relations of their own and did not need any assistance from him, and that one had not lived with him since his thirteenth year, a period of some twenty-five years. There is nothing in the case to indicate that the absent children paid any special attention to their father during the years which elapsed between the death of his wife and his own decease, or that he thought he was not perfectly competent to handle his own affairs, even to the extent of using his little estate, and the whole of it if necessary, to secure care in his old age.

The idea expressed by the trial judge that the agreement made for support was a grossly inadequate consideration for the property appellant received from the deceased, must have been made from the viewpoint of the result of the contract, instead of from that which was within reasonable probabili-

ties when the transaction occurred. Mr. Svenson's expectation of life, then, was between five and six years, with probabilities of all the vicissitudes which are common to old persons, often creating conditions almost impracticable to efficiently cope with by use of a money consideration. The fact that the extreme did not occur in this case, makes no difference, in looking at the matter from the standpoint of the parties when the contract was made. It must be presumed that they had in contemplation everything which might, in any reasonable probability, occur, and also in contemplation the special value which the filial attention of a daughter and special attention of her husband on her account, if not of his own regard for the aged man, might be to the latter.

It seems hardly possible that the trial judge could have looked, prospectively, from the standpoint of the parties when the contract was made, when he indulged in the idea that the property transferred was grossly disproportionate to the consideration received. The deceased, evidently, thought that there might not be much left, in the end, out of his little property,—probably not enough to be of any considerable account, divided into four parts, and so, without meaning any slight to his absent children, he determined to give all to the one who had been nearest to him,—the one to whom he turned when necessity compelled him to seek for a home away from his own place,—the one who took him in and had been kind to him, and on whom he relied for future care and such kindness as only a daughter is likely to bestow—and was very decided about it.

When it comes to matter of clear evidence of a disposition to exercise undue influence over the deceased, we are at a loss to find any. On the contrary, there seems to be very clear direct evidence that no such disposition existed. There is no question but what the one called in to act as legal adviser and the one who was called to be a witness were reputable men. Mr. Anderson, who attended to drawing the papers and ad-

vised in respect as to how the transfers should be made, appears to have been a very considerate man of experience, who appreciated that, on account of Mr. Svenson's age, it was advisable to proceed with deliberation and to be reasonably sure of his having a full understanding of what he had and that to transfer all for the benefit, in effect, of one child might lead to difficulty with the others, unless he, clearly, acted freely and intelligently in the matter. So, some two hours were taken in doing the business which might, under some circumstances, have been done in half an hour. Each particular note or certificate of deposit was taken up and only disposed of when Mr. Anderson was satisfied that Mr. Svenson appreciated just what it was. His mind was turned, time and time again, by appellant and his wife to the subject of favoring his absent children by bestowing upon them some of the property; but he declined to do so, showing some irritation upon being pressed to consider the matter after letting it be known that he had made up his mind what he wished to do. At the last, in order to make sure that Mr. Svenson had acted of his own free will, Mr. Anderson, in the presence of the witness, appellant, and his wife, said to the old man: If at any time you are dissatisfied with what you have done, let me know and I will return and we will do it all over.

The circumstance of Mr. Svenson so emphatically declining to reserve any property for his absent children as to give the impression that he was irritated by the suggestion that he should do so, is not very significant. When viewed in its proper light, there seems to be no clear foundation in the evidence for the conclusion that Mr. Svenson was either incompetent or acted under undue influence. His final declination, with some show of irritation, to reserve any property for the absent children, instead of indicating that he was in an abnormal condition or under undue influence, seems to evidence the contrary. The whole transaction shows that he

knew just what he had, that he appreciated he had another daughter and two sons, but had so firmly made up his mind to what he wished to do that, when treated as if, possibly, he did not appreciate what he was doing or that what he had determined to do might not be considered right, he resented it. His manner was indicative of his being a resolute old man who had deliberately formed a design in regard to his property, and did not want any advice from any one as to his duty, or the propriety of his act, and would not brook any interference.

That the manner of Mr. Svenson, as indicated, fairly evidences a deliberate plan of disposition of his property, is corroborated by evidence of occurrences before the transfer. Such occurrences also show there was no thought on the part of appellant of preventing Mr. Svenson's absent children from counseling him, if they desired to do so, in respect to his care in old age and the disposition of his property. In this connection, it is considered, that the evidence of appellant's wife that she, by his direction, repeatedly informed her brother Sievert by letter, that her father desired to make a full disposition of his property, either to her and her husband or to some institution, to secure his future care, which was taken under objection, should have been considered. She obviously was agent for appellant in writing the letters. There can be no doubt about that. If, by letter, appellant and his wife informed Sievert, as is claimed, it is very persuasive against the claim of undue influence and incompetency as well. The evidence is, practically, undisputed that correspondence was had between appellant's wife and Sievert, several letters passing, and that, in those letters, he was informed that his father wanted to make a final disposition of his property. She testified very positively in respect to the matter. He testified in a somewhat contradictory and uncertain way, as if he had no definite remembrance as to what was written to him. On the whole, his evidence shows that

he, at least, was informed by appellant's wife that his father wished to make a disposition of his property of some kind. Under the circumstances, he must have supposed that his sister would be at last a favored beneficiary. It is quite probable that he was made fully acquainted with the wish of his father to convey his property to some person or institution to secure his future support, just as Mrs. Lorentzen testified.

In connection with the fact that Mr. Anderson admonished Mr. Svenson, after the transfers were all made, that if at any time the latter should be dissatisfied with what he had done, to let the former know and he would come out and fix the matter over again, it is significant that, though Mr. Svenson was substantially in full possession of his faculties for a year, more or less, thereafter, he did not by act or word show any desire for any change. The old man's mental condition, some two months after the transaction in question, is indicated by the circumstance that, when the pastor of the church to which appellant and his wife belonged, called at the house, he talked intelligently and thought to send greetings to the pastor of his own church. There are ample indications in the record that the deceased, for months after the particular transaction, was fully competent to reconsider it and express dissatisfaction therewith and was free to do so if he desired, yet he gave not the slightest sign in that regard.

Without pursuing the subject discussed further it seems that enough has been said to show that the evidence, from the viewpoint of right rules of law, does not support the findings and that, had the trial court looked at the matter from such viewpoint, the result would have been different.

*By the Court.*—The judgment is reversed, and the cause remanded with directions to dismiss the same with costs.

BARNES, J. (*concurring*). I agree in the result. For reasons stated in *Ball v. Boston,* 153 Wis. 27, 141 N. W. 8, I do not agree in all that is said in the opinion.

KINDERVATER and another, Appellants, vs. TILL, Respondent.

*January 13—February 3, 1914.*

*Oral contracts: Validity: Statute of frauds: Indivisible contract: Performance by one party.*

1. An oral contract by which defendant agreed that, if plaintiffs would purchase the interest of their partners in a bus line for conveying passengers to defendant's sanatorium, he would extend for four years his existing contract with said bus line and would not during said term treat at said sanatorium any person other than those brought thereto by said bus line, and that if anything should occur to interrupt said business during said term he would protect plaintiffs against any loss by reason of the purchase, was an entire contract, not divisible.
2. Such oral contract, since it purported to bind defendant for four years, was void under sec. 2307, Stats., as a contract which by its terms was not to be performed within one year from the making thereof.
3. The fact that plaintiffs agreed to the terms and to the continuance of the existing contract between the bus line and defendant and proceeded to purchase their partners' interest in the bus line, did not constitute full performance on their part of the oral contract in suit or take it out of the statute of frauds.

APPEAL from a judgment of the circuit court for St. Croix county: E. C. HIGBEE, Judge. *Affirmed.*

Two actions were commenced and consolidated. The complaint in each action contained one cause of action. The causes of action embraced in the two former actions are denominated in this action first cause of action and second cause of action. The second cause of action went in favor of the plaintiffs, and no appeal was taken by the defendant herein. The first cause of action was brought for breach of an alleged oral contract, and the jury returned the following verdict:

"(1) Did the defendant on the 16th day of May, 1910, promise and agree to and with the plaintiffs, that if they, the

plaintiffs, would purchase the interest of A. L. and W. H. McDonald in the Till Bus Line Company, for the sum of $4,000, that he, the said defendant, would extend and continue in force the contract between himself and the said Till Bus Line Company, made and executed on the 2d day of November, 1909, for the term of four years, and that he would not treat at the said sanatorium, any person other than those brought thereto by the said Till Bus Line Company, and that if anything should occur or happen to interrupt said business during said term, that he would furnish a purchaser for the property of the Till Bus Line Company who would pay the plaintiffs the sum of $8,000 therefor, and that in case he should fail to find or furnish such a purchaser for said property, that the plaintiffs might sell the same at public auction and that he would pay to them the difference between the sum realized upon such sale and the sum of $8,000? *A.* Yes.

"(2) If you answer the foregoing question 'Yes,' then did the plaintiffs, in reliance upon said promise and agreement on the part of the defendant, purchase the interest of the said McDonalds in said Till Bus Line Company and pay to said McDonalds the sum of $4,000, in reliance upon said promise and agreement? *A.* Yes.

"(3) If you answer question No. 2 'Yes,' then did the defendant, on or about the 20th day of May, 1910, consent to a resale of a portion of said property to said McDonalds for the sum of $1,500? *A.* Yes.

"(4) If you answer question No. 3 'Yes,' then did the defendant consent to the plaintiffs' taking a portion of the property of said Till Bus Line Company to Canada? *A.* Yes.

"(5) If you answer question No. 4 'Yes,' then what was the reasonable value of the property so taken to Canada by the plaintiffs? *A.* $335.

"(6) If you answer question No. 2 'Yes,' then did the defendant, on or about the 16th day of November, 1912, voluntarily leave said sanatorium and thereafter refuse to treat patients brought thereto by the plaintiffs? *A.* Yes.

"(7) If you answer question No. 6 'Yes,' then did the plaintiffs thereupon tender the property of the said Till Bus Line Company to the defendant and demand a purchaser therefor, in accordance with the terms of the contract mentioned in question No. 1? *A.* Yes.

"(8) If you answer question No. 7 'Yes,' then did the plaintiffs thereafter sell at public auction all of the said property except that which had been taken to Canada and that which had been resold to the McDonalds? *A.* Yes.

"(9) If you answer question No. 8 'Yes,' then what was the sum realized from said property upon said sale? *A.* Eight hundred and five dollars and nine cents ($805.09)."

The court denied the plaintiffs judgment upon this verdict and ordered judgment of no cause of action and costs in favor of the defendant. Judgment for defendant was entered accordingly, from which this appeal was taken.

For the appellants there was a brief by *McNally & Doar,* and oral argument by *W. F. McNally* and *W. T. Doar.*

For the respondent there was a brief by *James R. Hickey,* attorney, and *N. O. Varnum,* of counsel, and oral argument by *Mr. Hickey.*

KERWIN, J. It appears without dispute that the contract mentioned in the first cause of action was oral, and the question arises whether it was void under sec. 2307, Stats., because by its terms it was not to be performed within one year from the making thereof.

It is insisted by appellants that it was valid because it consisted of two independent parts, one part called by counsel the "working part" and the other the "indemnity part." It is argued that each part is complete in itself, separate and divisible from the other. The substance of the contract claimed to have been made is found in the first question and answer of the special verdict.

This action is brought, as stated by counsel for appellants, for breach of the so-called indemnity part of the contract. We are convinced that the contract is an entire contract, not divisible, and must stand or fall as such. On this point *Hull v. Brown,* 35 Wis. 652, and *Mason v. Nichols,* 22 Wis. 376, and cases from other jurisdictions, are relied upon by counsel for appellants. An examination of these cases will

show that they are not controlling here. Cases more nearly in point, and holding that contracts quite similar to the one here are not divisible, but that each part is dependent upon other parts and make but one contract, are the following: *Reindl v. Heath,* 115 Wis. 219, 91 N. W. 734, and *Martin v. Estate of Martin,* 108 Wis. 284, 84 N. W. 439. We are satisfied that the contract is not divisible.

It is further contended that the contract is by its terms to be performed within one year and therefore valid. Counsel seeks to distinguish *Chase v. Hinkley,* 126 Wis. 75, 105 N. W. 230, from the instant case upon the ground that, while such contract for personal services might be terminated by the death of the servant before the end of the year, "contracting parties are not presumed to have in mind the termination of the agreement in that way," and hence counsel says such cases are not in point in the instant case.

Counsel relies upon *Heath v. Heath,* 31 Wis. 223, which was an oral contract between A. and B. to support C. for the remainder of her natural life, and it was held that the contract was not void because by its terms it might be fully performed within a year from its date. But that case is very different from the case here. In that case it was just as certain by the terms of the contract that it might be performed within one year as that it might not, for C. might die at any time. In the instant case the oral promise alleged to have been made by defendant purports to bind him for the term of four years.

The alleged oral contract is set up in the complaint, the substance of which is embraced in the first question of the special verdict, and is clearly within sec. 2307, Stats., as a contract not by its terms to be performed within one year from the making thereof. The oral contract alleged to have been made provides that defendant "then and there agreed with these plaintiffs that said plaintiffs would, for a period of four years from said date, have the exclusive right to

transport all persons desiring to visit said new sanatorium and might receive therefor the sum of seventy-five cents (75c) for each person transported, payable by said person, and that said defendant would remain at said new sanatorium for a period of four years from said 17th day of May, 1910, and treat all persons so transported by said plaintiffs and no others." And the said contract further provides that defendant would protect them against any loss by reason of the purchase for a period of four years from date. But it is argued by counsel for appellants that there was performance of the contract on the part of the plaintiffs and that such performance took the contract out of the statute. That this contention is untenable is established by the decisions of this court. *Chase v. Hinkley,* 126 Wis. 75, 105 N. W. 230; *Conway v. Mitchell,* 97 Wis. 290, 72 N. W. 752; *Cohen v. Stein,* 61 Wis. 508, 21 N. W. 514; *Salb v. Campbell,* 65 Wis. 405, 27 N. W. 45.

Moreover, there was no full performance on the part of the plaintiffs. There was merely a tender of performance of the plaintiffs' part of a void contract. The claim of performance stated in appellants' brief is to the effect that defendant proposed to the plaintiffs that if they would agree to the terms of the "working contract" and buy the McDonalds' interest he would indemnify them, and that plaintiffs did agree and bought the McDonalds out, hence there was full performance on their part. Counsel on this point relies upon *Treat v. Hiles,* 68 Wis. 344, 32 N. W. 517. It will be seen that in that case the court held that the contract was a contract for a partnership or a contract of partnership, and did not come within the terms of sec. 2307, Stats.

We deem further discussion unnecessary. We are satisfied that the judgment below is right and should be affirmed.

*By the Court.*—The judgment is affirmed.

NELSON, by guardian *ad litem*, Respondent, vs. SNOYENBOS, Appellant.

*January 13—February 3, 1914.*

*Appeal: Reversal: Errors, when prejudicial: Assault and battery: Excessive damages: Mitigation: Evidence: Relevancy: New trial: Discretion.*

1. Where in the opinion both of the trial judge and of this court the damages found by the jury were much too large, this court, even when it cannot hold that the refusal to grant a new trial was an abuse of discretion, may reverse the judgment because of errors in the admission and exclusion of evidence bearing upon the amount of damages which might otherwise have been passed as nonprejudicial.
2. In an action for false imprisonment and assault and battery, where there was evidence on behalf of defendant tending to show that he caught the plaintiff stealing tobacco in his store and moderately "spanked" him, although plaintiff denied the theft and testified to a more serious assault, a ruling by which the jury were told that the question of larceny was "absolutely of no importance" in the case was erroneous because, though not a justification, the larceny, if proven, would have an important bearing in mitigation of damages both compensatory and punitory.
3. So, also, the exclusion of evidence offered to show that about two months after the affair in question plaintiff was found in a store and was taken by the sheriff to the county jail, was erroneous because such evidence bore directly on the probable degree of shame and humiliation which plaintiff suffered from defendant's conduct, and so affected the amount to be recovered.
4. Such errors having intervened at the trial, and the damages awarded being much too large in the opinion both of the trial judge and of this court, and there having been, on a motion for a new trial, a showing of newly discovered evidence to disprove the chief element of damage claimed by plaintiff, a new trial should have been granted; and the judgment for plaintiff is accordingly reversed.

APPEAL from a judgment of the circuit court for St. Croix county: E. C. HIGBEE, Judge. *Reversed.*

For the appellant there was a brief by *McNally & Doar*

and *E. B. Kinney,* and oral argument by *W. F. McNally* and *W. T. Doar.*

*H. H. Dean,* for the respondent.

TIMLIN, J. In this action for damages caused by false imprisonment and assault and battery the trial court directed a verdict in favor of the infant plaintiff for compensatory damages and submitted the question of punitory damages to the jury. The latter assessed against the defendant $1,000 compensatory damages and $170 punitory damages. In his memorandum decision denying a motion for a new trial the learned circuit court stated with reference to the compensatory damages:

"The amount is much larger than it seems to me should have been assessed, for I cannot feel that the defect in plaintiff's eyesight is attributable to any act of the defendant. Yet I think the jury had evidence before them to justify them in finding that it was, and it was their province to decide that question."

When the trial judge is so impressed by the evidence, a just exercise of his discretion would warrant him in reducing the amount of the recovery or granting a new trial. Yet reversible error cannot be predicated alone upon his failure so to do. It also appears to us that the amount of compensatory damages is much larger than should have been assessed by the jury. These two things must be taken to accentuate errors in the admission and exclusion of evidence bearing upon the amount of damages which otherwise might have been passed as nonprejudicial.

The defendant is the keeper of a country store at Hersey in this state and the plaintiff is a school boy thirteen years of age. The plaintiff offered evidence tending to show that on April 1, 1912, while he was in defendant's store and near the tobacco showcase, he was forcibly seized, publicly accused of the theft of tobacco, forcibly detained for a considerable

time, and assaulted and beaten with considerable violence, by defendant. This assault consisted of a number of slaps with the open hand on each side of the head and of raising the plaintiff up and forcibly bringing him down in a sitting position on a hard-bottom chair. There was also evidence on the part of the plaintiff tending to show that prior to the assault in question his eyesight was good and after the assault it was impaired. The defendant offered evidence tending to show that the plaintiff was engaged in stealing tobacco and that the assault, somewhat in the manner described by plaintiff, was not of a serious character, but very moderate. A qualified physician and oculist gave his opinion that the defect which he found in plaintiff's eyes was not caused by any such assault. The testimony of the teacher and the school register showed that the plaintiff attended school nineteen and one-half days during the twenty school days in the month of April and his credit marks in the various studies were as usual. He completed the work of the fourth grade and was promoted to the fifth grade May 31, 1912. A verdict was of course properly directed because the conduct of the defendant was in violation of law. But if the boy was caught stealing and moderately "spanked," as one of the witnesses describes it, the amount of damages awarded is grossly excessive, particularly if there was very little evidence that his impaired eyesight was due to the alleged assault. The learned circuit court instructed the jury that among the elements of compensatory damages are "pain and suffering, both physical and mental, the feeling of shame and humiliation which you are convinced by a fair preponderance of the evidence and to a reasonable certainty the plaintiff has sustained." On the question of punitory damages he instructed: "If you should be convinced by the evidence that the defendant in doing what he did was actuated by malice or bad motive, then you are at liberty to assess," etc. He thus instructed the jury in such a way that they were per-

mitted to increase the amount of damages by reason of the absence of the said elements of mitigation which he excluded. While the defendant was being examined by plaintiff's counsel as an adverse witness, an objection was made by defendant's counsel on the ground of immateriality to a question asking defendant what he did with the package of tobacco taken from the plaintiff. The learned circuit judge said in the presence and hearing of the jury:

"We are not going to try the question of larceny in this case or whether it was his tobacco or the boy's tobacco. It is absolutely of no importance. If the boy had stolen it, it didn't give him any right to arrest him, if that is a fact that he did."

The law on this subject is found in *Bergeron v. Peyton,* 106 Wis. 377, 82 N. W. 291. Under the circumstances in this case it would not constitute a justification for the arrest made, but it would have an important bearing in mitigation of damages both compensatory and punitory. So it did have something to do with the case, and it was necessary to try the question of larceny, and the expression was erroneous and prejudicial to appellant if heeded by the jury.

On cross-examination of the plaintiff objection was made by plaintiff's counsel to the following question: "When did you leave home?" The defendant then offered to show by such cross-examination that by reason of plaintiff having been found in a store about two months after the affair in question he was taken by the sheriff to the county jail and thence by the sheriff to New Richmond and placed with a family there. The offer was not very definite, but the cross-examination bore directly on the probable degree of shame and humiliation suffered by reason of the defendant's conduct and should have been allowed because it affected the amount to be recovered.

The testimony of the plaintiff to the effect that his eyesight was good prior to the battery but impaired thereafter

was given without any previous notice of such claim to the defendant by pleading or otherwise. It is opposed by the character of the defect and the testimony of the physician, and on a motion for a new trial on the minutes for error of the court and upon affidavits of newly discovered evidence the defendant produced the affidavit of one Annie Van Guilder in substance that the plaintiff had complained to her of defective eyesight and headaches prior to April 1, 1912. The motion for a new trial was denied.

Where the trial court was himself in doubt about the justice of the verdict on this question of damages, where these errors intervened at the trial, and where this new evidence was presented, a new trial should have been granted. The judgment must be reversed and the cause remanded for such new trial.

*By the Court.*—It is so ordered.

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## COOK, Appellant, vs. GUST, Respondent.

*January 14—February 3, 1914.*

*Slander: Evidence: Competency: Party as witness: Credibility: Privileged communications: Instructions to jury: Common knowledge: Appeal: Harmless errors.*

1. In an action for slander, where the complaint charged that defendant stated to one L. and his wife and son that plaintiff had set fire to and burned a certain cheese factory, and where plaintiff, on his direct examination as a witness in his own behalf, had testified that he had made no threats directly or indirectly with respect to burning the factory, it was proper to permit a witness for defendant to testify that two or three weeks before the factory burned plaintiff had suggested that they ought to burn the factory and that he knew of a party whom they could get to do it.
2. Plaintiff having denied on cross-examination that he had said to one S. that he was going to run defendant out of town, it was not error to allow S. to testify that defendant had made

such statement. Being a witness in his own behalf, plaintiff's animus or bias toward defendant was not a collateral fact, but one which may ordinarily be shown as to any witness, as affecting his credibility.

3. Where, at the time in question, L. was considering an invitation to join a corporation which defendant and others were forming (and from which they planned to exclude the plaintiff) to build a new factory in place of the one which was burned, the alleged slanderous statement, if made by defendant in good faith and without malice in explaining to L. the reasons why he believed plaintiff should be left out, was privileged so far as made to L. himself, and was privileged also as to the wife and son of L. if they had a common interest with him in the disclosure by reason of the fact that it was customary for farmers so situated to consult with their families in regard to such business transactions.

4. Although an instruction that the jury might find the statement privileged as to the wife and son of L. if their presence "could not have been avoided," should not have been given because there was no evidence warranting it and it was obvious that their presence could have been avoided, yet, since that fact must have been apparent to the jury, the error in giving such instruction was not prejudicial, there being other legitimate grounds upon which the verdict for defendant might be based.

5. A further instruction that the jury might find the statement privileged as to the wife and son of L. if they were present in the usual course of the business affairs in which they were then engaged, was not erroneous, since in effect it merely permitted the jury to decide whether or not it was a matter of common knowledge that farmers counsel and advise with their families in reference to business transactions of that nature.

6. In considering and testing the credibility of the evidence bearing on the question of privilege, the jurors had the right to take into account matters within their common knowledge.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an action for slander. It was charged in the complaint that the defendant stated to one Julius Lewer and his wife and son that plaintiff set fire to a certain cheese factory and burned it. Defendant denied that the conversation alleged in the complaint took place. The answer also set forth

facts tending to show that any communications made by defendant to Lewer were privileged. After the factory burned, the farmers in the vicinity decided to erect a new one, and some meetings were had between the proposed stockholders to make the necessary arrangements. At these meetings the advisability of not taking in the plaintiff was discussed, and he was left out apparently because he had caused considerable trouble while he was a member of the old company and because there was a strong suspicion that he had burned the old factory because of such trouble. Lewer was a newcomer and it was the purpose of the promoters of the new scheme to interest him in it. The defendant admitted that he might have communicated the rumors that were afloat in regard to plaintiff to Lewer and others at some of the meetings had for the purpose of perfecting the organization of the new company. The plaintiff's evidence tended to show that the alleged slanderous words were spoken to Lewer at or near his house and that the latter then called his wife and fourteen-year-old son to the place where he and defendant were talking and requested the defendant to repeat the statement in their presence, which he did. There was no evidence tending to show malice. The jury returned a general verdict for the defendant. The plaintiff appeals and assigns three errors, two on the admission of evidence and one on an instruction given to the jury.

For the appellant there was a brief by *Aylward, Davies & Olbrich,* and oral argument by *M. B. Olbrich.*

For the respondent there was a brief by *Jones & Schubring,* and oral argument by *B. W. Jones.*

BARNES, J. 1. The defendant was allowed to show by one Brown that the latter had a conversation with plaintiff two or three weeks before the factory burned, in which plaintiff suggested that they ought to burn the factory and that he knew of a party named Wild whom they could get to

do it. Defendant apparently did not know of this alleged conversation when he talked with Lewer about plaintiff's connection with the fire. It is urged that it was prejudicial error to admit this evidence. The evidence was well calculated to place the plaintiff in an unfavorable light before the jury. We think the door for its admission was opened by the plaintiff. Before this evidence was offered, he, on his direct evidence and in reply to questions propounded by his own counsel, testified that he had made no threats directly or indirectly with respect to burning the factory. Having invited inquiry into his conduct in this manner, he is in no position to find fault because the defendant was permitted to meet the issue thus raised. His denial that he made any threats might well have considerable weight with the jury and place the defendant at a disadvantage if he were not permitted to contradict it.

2. The plaintiff was interrogated on cross-examination in reference to an alleged statement made to one Seth to the effect that he was going to run the defendant out of town. Plaintiff denied making any such statement, and defendant was permitted to call Seth as a witness and spread his evidence before the jury to the effect that such a conversation took place. It is said that it was error to permit Seth to so testify. We think this evidence was neither erroneous nor prejudicial. The plaintiff was a witness in his own behalf and his animus or bias toward the defendant was not a collateral fact, but one which may be ordinarily shown as to any witness for the purpose of placing before the jury an essential fact which may affect his credibility.

3. The principal contention of the appellant is that the following instruction given to the jury was erroneous and prejudicial:

"If you find that *Mr. Gust* spoke to Mr. Lewer on April 8, 1908, concerning *Mr. Cook,* and that such words were spoken to him as one who was interested in this factory under such

circumstances that they would be privileged under the rules just given you, then the fact, if such be the fact, that Mrs. Lewer and her son heard what *Mr. Gust* said does not, standing alone, take the case out of the privilege, if you find that their presence could not have been avoided by *Mr. Gust,* or if you find that they happened to be present in the usual course of the business affairs in which Mrs. Lewer and her son were then engaged."

It is not claimed that the alleged statement made to Lewer was not qualifiedly privileged as to him under the circumstances under which it was made, but it is urged that it was not so privileged as to the wife and son.

The portion of the instruction which advised the jury that they might find the communication privileged if satisfied that the presence of Mrs. Lewer and the son "could not have been avoided" should not have been given, because there was no evidence which warranted its submission. It is perfectly obvious to any one that their presence could have been avoided. That fact must have been apparent to the jury, and it is altogether improbable that they found for the defendant because of this part of the instruction, when there were other legitimate grounds on which the conclusions reached might be arrived at. The error committed in giving this part of the charge was not prejudicial under sec. 3072*m,* Stats.

The only other portion of the charge complained of is that by which the jury were informed that they might find the communication privileged if the wife and boy were "present in the usual course of the business affairs" in which they were then engaged.

At the time of the alleged conversation Lewer had been invited to become a stockholder in the new corporation and was considering the matter. It was planned to leave *Cook* out, and, if not actuated by malice, the defendant might state the reasons which led him to believe that *Cook* should be left out. It is probably a very general custom for farmers to consult their wives and members of their family when

they are about to engage in a new business enterprise of some importance. Where this practice is pursued, such communication as was here made is privileged as to the other members of the family as well as the husband, assuming that it is made in good faith and not from malicious motives. What the court did in substance in the instant case was to permit the jurors to decide whether or not it was a matter of common knowledge that farmers counseled and advised with their wives in reference to business transactions of this nature. Had the court so instructed the jury as a matter of law, we would hesitate to hold that the instruction was wrong. This being so, we cannot hold that it was error to submit the question to the jury. In considering and testing the credibility of the evidence bearing on the question of privilege, the jurors had the right to take into account matter within their common knowledge. *Solberg v. Robbins L. Co.* 147 Wis. 259, 133 N. W. 28. It is true that the instruction refers to the business in which Mrs. Lewer and her son were engaged, instead of that in which her husband was engaged. The instruction was not happily worded, but we think the jury would understand from it that if all three of the listeners to defendant's statement had a common interest in the disclosure the communication was conditionally privileged as to all of them.

*By the Court.*—Judgment affirmed.

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KERWIN, Respondent, vs. ALBRECHT, Appellant.

*January 14—February 3, 1914.*

***Pleading: Amendment: Changing cause of action: Officers: Taking excessive fees: Penalty: Statute construed: Error in allowance, how corrected: Justices' courts: Replevin.***

1. Under sec. 2669*a*, Stats., it was proper to permit a complaint to be amended so as to change the action from one for money

had and received to the statutory action (based upon the same transactions) provided for by secs. 2955–2957, Stats.

2. The words "allowed by law" or "allowed by the laws of this state," in secs. 2955–2957, Stats., relate only to cases in which a definite sum is fixed by the statute or the laws of the state as compensation for a specific service. They do not apply to a case where the statute (sec. 3752, Stats.) provides that a justice of the peace may allow to the officer having charge of property seized on a warrant of replevin "such compensation for his trouble and expenses as shall be reasonable and just."

3. Any error committed by the justice having jurisdiction of the subject in the allowance of compensation under sec. 3752, Stats., should be corrected in the replevin action before the justice or on appeal; and no independent action can be maintained to correct such error.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Plaintiff was the defendant in an action in justice's court wherein a horse was replevied. The defendant, who was a constable, served the papers in the action and took possession of the horse and left it with one Dorn pending the suit, who kept it for thirty days. Judgment went against the plaintiff, and he filed a notice of appeal, but did not perfect his appeal, and the case was settled, whereupon the justice taxed costs against him and, among other items, made an allowance of $16.50 in favor of the defendant as and for his trouble and expense in keeping the horse, pursuant to sec. 3752, Stats. The constable presented no itemized statement of disbursements for keeping the horse and made no specific claim of any amount to the justice at the time the allowance of $16.50 was made. The justice in circuit court testified that he considered fifty-five cents a day a reasonable allowance for the trouble and expense of keeping the horse and for the legal responsibility involved. After the case was settled and the $16.50 paid to the defendant, he tendered the money to Dorn, who refused to take it, stating that he did not intend to charge for keeping the horse. It appears from the evidence that at

the time the allowance was made by the justice the defendant did not know that Dorn would not charge him for the keep of the horse. Plaintiff, learning that the defendant received $16.50 for the keep of the horse and that Dorn had made no charge therefor, brought an action for money had and received in justice's court for the amount of $16.50, and judgment was rendered against the defendant for that amount. From this judgment defendant appealed to the circuit court, and plaintiff was there given leave to amend the complaint by alleging a cause of action under secs. 2955–2957, Stats. 1911, for the sum of $25 penalty and $16.50 damages. The circuit court found that the defendant collected from the plaintiff the sum of $16.50; that he had no trouble and incurred no expense in keeping and maintaining the horse during the pendency of the replevin action, and that he rendered no service for which he was entitled to receive the sum of $16.50, or any part thereof, as compensation, and held that plaintiff was entitled to judgment against defendant for the sum of $16.50 actual damages and $25 penalty under sec. 2957, together with his costs and disbursements. From a judgment entered accordingly the defendant appealed.

For the appellant there was a brief by *Buell & Lucas,* and oral argument by *F. W. Lucas.*

For the respondent there was a brief by *Hall & Baker,* and oral argument by *F. W. Hall.*

VINJE, J. The circuit court, under the provisions of sec. 2669*a,* Stats. 1913, properly allowed the complaint to be amended, though it changed the nature of the action from one for money had and received to the statutory action provided for by secs. 2955–2957, Stats. 1913. The amended complaint stated a cause of action arising out of the same transactions, and therefore came within the requirements of sec. 2669*a* as to amendments to the complaint.

The statutory action, however, cannot be maintained, for

this is not a case under secs. 2955–2957. In *Musback v. Schaefer,* 115 Wis. 357, 91 N. W. 966, these sections were construed, and it was there held that the words therein "allowed by law" or "allowed by the laws of this state" related only to cases in which a definite sum is fixed by the statute or the laws of the state as compensation for a specific service. They do not include a case where, as here, the statute (sec. 3752, Stats. 1913) provides for "such compensation for his trouble and expenses . . . as shall be reasonable and just" to be allowed or taxed by the justice. It was obviously the intent of the legislature that no official shall be subject to the penalty provided for by sec. 2957 unless he can by a reference to the laws of the state easily determine for himself whether or not he charges more for a service than is allowed by law, or whether he charges the statutory fee for a service not rendered at all. To subject an official to such penalty, where the court is required to allow what is just and reasonable, in case of an erroneous or an excessive allowance, would be unjust. The action under the statute to recover damages and penalty is limited to cases in which definite compensation for a service is fixed by the laws of this state, and such definite compensation is received, except lawful advance fees, where no service is rendered; or, where the service is rendered, more than such definite compensation is received therefor.

In the present case the defendant did render some service for which the justice could lawfully have allowed him compensation under sec. 3752, namely, for his trouble and expense in taking the horse from the defendant in the replevin action and delivering it to Mr. Dorn. Of course the compensation allowed was excessive for the service rendered, and no part of it appears to have been allowed for such service at all. But the justice had jurisdiction of the subject of allowing compensation to the defendant for services rendered in the replevin action, and any error committed by him in

the allowance of costs should have been corrected in the action before the justice or on appeal therefrom. No independent action can be maintained to correct such error. To permit it would be to subject every judgment of an inferior court, where a party felt aggrieved as to the taxation of costs, to a test as to the correctness thereof by a separate suit instead of proceeding in the same action as the statute and practice requires.

*By the Court.*—Judgment reversed, and cause remanded with directions to dismiss the complaint upon the merits.

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JOHNSON, Appellant, vs. BANK OF SUN PRAIRIE, Respondent.

*January 14—February 3, 1914.*

*Oral contracts: Validity: Statute of frauds: Promise to pay debt of another: Executed contract.*

1. Where plaintiff turned over to defendant certain accounts for collection under an oral agreement that defendant might apply the proceeds upon the debt of a third person to defendant, such agreement was not a promise by plaintiff to answer for the debt of another person, and hence was not required by the statute of frauds (sec. 2307, Stats.) to be in writing.
2. So far as moneys were collected and applied under such agreement the contract was fully executed and that part of the contract could not be set aside even if the original promise were held to be within the statute.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The action was brought to compel an accounting for moneys collected on a lot of open accounts which plaintiff turned over to the defendant for collection. By the answer it is alleged that the accounts were turned over to the defendant under the agreement that the bank might collect the same and apply the proceeds so far as necessary to pay the debt of

one Kehl, the plaintiff's son-in-law, and in consideration the promise of the bank (which was afterwards fully carried out) that it would dismiss a certain lawsuit then pending against Kehl to recover a part of the debt and refrain from entering judgment upon a judgment note given by Kehl for the remainder of his debt; that there has been collected $513.89 upon the accounts, all of which has been applied upon Kehl's debt, leaving $40.58 still unpaid thereon. The bank claims the right to hold the accounts and collect enough thereon to pay the balance of Kehl's debt. A general demurrer to the answer was overruled, and plaintiff appeals.

For the appellant there was a brief by *Bagley & Reed,* and oral argument by *W. R. Bagley.*

For the respondent there was a brief by *Ollis, Nelson & Bushnell,* and oral argument by *A. H. Bushnell.*

WINSLOW, C. J. The demurrer was properly overruled because:

1. So far as the moneys which have been collected and applied are concerned, the contract has been fully executed, and under very familiar principles that part of the contract could not be now set aside even if the original promise were held to be within the statute. *Larsen v. Johnson,* 78 Wis. 300, 47 N. W. 615.

2. The turning out of securities for collection under the agreement that the proceeds may be applied on a third person's debt is not a promise to pay another's debt, and hence not required by the statute of frauds to be in writing. Whether any money was ever collected or collectible on the accounts there would be no breach of any promise made by the plaintiff.

*By the Court.*—Order affirmed.

ROBERTSON, Respondent, vs. DOW, Appellant.

*January 14—February 3, 1914.*

*Appeal: Harmless errors: Questions considered: Form of exceptions: Briefs: Judgment: Upon whom binding: Agency: Authority to bring suit: Partnership: Pleading: Reply: Instructions to jury: Evidence: Unsigned agreement: Conclusions: Witnesses: Competency: Transactions with person since deceased.*

1. Slight inaccuracies in the statement of the issues in a case by the court to the jury are immaterial errors and will be disregarded on appeal.
2. One who is a party to an action by his authority, given beforehand or by subsequent ratification, is bound by the result.
3. In the brief for appellant counsel should particularly point out and discuss in an orderly way the errors relied upon, and should not, upon a mere reference to the exceptions, ask this court to review the trial court's charge to the jury.
4. Exceptions to the charge of the trial court to the jury should consist of concise paragraphs, pointing out specifically particular detail portions of the instructions, each covering a single matter, as contrary to law and not warranted by the evidence.
5. Whenever it appears probable that injustice might otherwise be done to a party on appeal, the court will disregard technicalities and rigid rules of practice and will review the record notwithstanding shortcomings of counsel in presenting the case.
6. In an action upon the judgment of a court of another state, an answer that the action in which such judgment was rendered was brought in defendant's name without authority is purely defensive and a reply is not required.
7. There being evidence tending to show that a person who caused an action to be brought in defendant's name was either his agent or his partner in the business to which such action was related, instructions submitting to the jury the questions whether such person had express authority "as agent or in any other capacity," and whether he was a partner and as such had the right to bring the action without express authority, were proper, where the court also instructed as to the essential facts of a partnership and left it to the jury to determine whether or not such facts existed.
8. An unsigned paper purporting to embody an agreement between certain parties named therein, is admissible in evidence

against one of such parties to prove the relations existing between them, when offered in connection with evidentiary admissions by him that it does indicate the actual arrangement subsisting between the persons named.

9. Persons not parties to the action and from, through, or under whom plaintiff does not in any way derive his interest or title, are not incompetent under sec. 4070, Stats., to testify as to conversations and transactions which they had with a deceased partner of defendant, in an action brought against him as surviving partner.

10. In an action to enforce a judgment rendered against defendant in an action of replevin instituted in his name in another state by direction of an alleged agent, questions put to the defendant by his counsel as to whether he ever made claim to any property in the possession of the defendant in replevin or ever authorized that action, were properly ruled out as calling for mere conclusions of the witness.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

In an action in a district court of North Dakota having jurisdiction of such subjects between *George Dow* as surviving partner of the firm of Dow & Klauber against *Fred Robertson* to recover four horses, such proceedings were duly had that a judgment, in due form, was rendered in favor of *Robertson.* Thereafter, action on the judgment was commenced by him against *Dow* in the circuit court for Dane county, Wisconsin. The complaint was in the usual form and substance. The defendant answered to the effect that T. F. Murtha, an attorney of the North Dakota court who commenced the action there did so without authority; that neither *Dow* nor his partner Klauber authorized or knew of such action until long after the trial; that the action was commenced at the instigation of one Watson who obtained possession of the horses and subsequently sold the same and appropriated the proceeds to his own use.

Thus the issue tried was as to whether *Dow,* or his partner Klauber, authorized, directly or indirectly, commencement of the Dakota action, or had knowledge of such commence-

ment and ratified the same. In the event of the question in that regard being solved in plaintiff's favor, he was clearly entitled to judgment.

There was evidence proving, or tending to prove, as the trial court viewed the matter when submitting the issues to the jury, these facts: Watson was either an agent of *Dow* and Klauber, or their partner, or interested with them in the business of selling horses in the state of North Dakota. In some one of these capacities he employed Mr. Murtha, a lawyer, or the firm of which he was a member, to commence an action in the district court in North Dakota to recover four horses of the present plaintiff and to prosecute the same to a termination. That was done, the present defendant being, at the end, the sole plaintiff. The horses were claimed to belong to the firm of which *Mr. Dow* was a member, but had been wrongfully taken by *Mr. Robertson* and were wrongfully detained by him. In due course, pending the action, the horses were seized by the sheriff and delivered into possession of Watson as the representative of plaintiff in such action. He sold the horses and, in the end, included the proceeds in money accounted for to *Dow* and paid to him. The Dakota action resulted in a judgment in favor of the defendant therein, plaintiff herein, against *Mr. Dow*. That forms the basis of this action. Such judgment was unsatisfied when this action was commenced. *Dow* endeavored to prove his claim that Watson had no authority to represent him or the firm of which he was a member in commencing the North Dakota action; that the action was Watson's personal affair and that the proceeds of the sale of the horses which he obtained possession of in such action never came to the possession of the person, or persons, he assumed to represent, but were appropriated by him as his own property.

The court submitted the major and subsidiary controversies to the jury, instructing them on the several phases of

the case, resulting in a verdict in favor of plaintiff upon which judgment was rendered and which is now challenged on appeal.

*F. K. Shuttleworth,* for the appellant.

For the respondent there was a brief by *Tenney, Tenney & Reynolds,* and oral argument by *Edward J. Reynolds.*

MARSHALL, J. It is contended that the trial court did not accurately state the issues between the parties. That we regard as unsubstantial. The real gist of the matter, as shown by the evidence, was fairly within the scope of the pleadings and, in one view, entitled plaintiff to recover. That is sufficient on this branch of the case. Little inaccuracies in the statement of issues by a court, count for nothing. Was *Dow* a party to the Dakota action by his authority, given originally, or subsequently ratified by him? If so, he became bound by the result. The subject was fully submitted to the jury and the finding was in respondent's favor.

Counsel for appellant refers, without argument, to exceptions to the court's instructions and invites this court to review the charge, not even referring to the page of the record or case where the same may be found. In such circumstances, this branch of the case might be passed over without notice. Counsel, in his brief should refer, in an orderly way, to such exceptions to the charge as are thought material to the case and not merely incorporate the exceptions in the assignments of error and suggest, in a general way, in the argument, their existence and request this court to review them. Exceptions are often filed covering many matters, for the purpose of preserving everything for review which, in any reasonable probability, might affect the result, without expecting to insist upon all of them upon appeal. Often exceptions are saved which are, later, not deemed worthy of being presented here for consideration. Counsel should

study a case with care and fence his activities, upon coming here, within such narrow limits as, with fair probability, to include only prejudicial errors, and should particularly point out and discuss such errors. In case of that not being done, this court has, in general, been accustomed to assume that matters not particularly pointed out and discussed do not involve error at all, or at most, no error of prejudicial character. However, in case of its appearing probable that injustice might otherwise be done to a party, the court will not hesitate to overlook inadvertence of counsel, and, not standing on any technicalities of practice or rigid rules, will review the record as to matters not presented so as to require it.

The conditions above referred to existed here; but lest injustice might be done to a party seeking judicial instrumentalities to redress a supposed wrong, we have carefully read the instructions of the learned circuit judge, and particularly those portions included in the filed and printed exceptions and will refer to them briefly.

It is said that the court improperly submitted the matter of whether Watson had authority to commence the action in the North Dakota court in the name of *Dow* and Klauber as partners; that there was no issue raised in respect to the matter since there was no reply to that portion of the answer alleging that Watson had no authority to bring the action in question. We do not find any such allegation in the answer, but do find an allegation to the effect that the North Dakota action was started by Watson in the name of *Dow* without authority. Probably counsel intended to be understood by the exception that the answer set forth that Watson brought his own action in appellant's name and that such allegation called for a reply in order to put the matter in issue. It is sufficient to say that the allegation referred to was purely defensive and that a reply is not proper in such a case.

It is further suggested that the court improperly submitted the question of whether Watson had authority to represent the firm of Dow & Klauber in commencing the Dakota action because there was no evidence tending to show that he did. We might, properly, pass over this subject because counsel failed to comply with the rule as to indexing the printed case. There are references to the record as to where the evidence of each witness may be found, but none representing the printed case. However, we have overlooked this plain violation of a long-standing and familiar rule and successfully searched for Watson's evidence as printed, whereby it appears that he testified, in effect, that he was the agent for Dow & Klauber in their business of selling horses in North Dakota; that the litigation in question grew out of such business and that he was directed by *Mr. Dow,* in case of needing legal assistance in the business of *Dow* and Klauber, to employ Mr. Murtha; that, pursuant thereto, he caused the Dakota action to be commenced, and, in due course therein obtained possession of the horses in question and sold them and turned the money over to *Dow,* informing him of the pendency of such action and that it related to such horses. There was ample evidence given by Watson and others to warrant the court in submitting the question to the jury as to whether he had authority to do what he did, and whether *Dow* received the proceeds of the sale of the horses.

Complaint is made because the court charged the jury that

"Authority to bring the action against *Mr. Robertson* may be conferred by express authority to Mr. Watson broad enough to warrant Mr. Watson in bringing this action while acting as agent or in any other capacity for *Mr. Dow* and Mr. Klauber."

We do not observe anything wrong in that. The instruction was plainly directed to evidence tending to show that Watson had either general or special authority to represent

*Dow* and Klauber. The words "or in any other capacity" had reference to the evidence tending to show that, if Watson was not the employee of *Dow* and Klauber, he was a partner or was jointly interested with them in the horse business, and that in either capacity was competent to receive express authority to do what he did. Whether he acted in either of the capacities suggested by the court, and if so, which one, was left entirely to the jury as was also whether such authority as the court ruled would amount to express authority. There is nothing about the instruction which is ambiguous or erroneous or involves submission to the jury to solve a question of law.

Further complaint is made because the court instructed the jury:

"If you find that Mr. Watson did not have express authority to bring this action against *Mr. Robertson,* then you will determine from the evidence whether Mr. Watson was a partner of *Mr. Dow* and Mr. Klauber, and whether as such partner he had the right to begin this action in their name without any express authority so to do."

Counsel's suggestion that there is a contradiction between such instruction and the previous one seems to spring from want of appreciation of the plain meaning of language. The court, after submitting the question of whether Watson was expressly authorized, took up the matter of whether he had the right to do as he did in absence thereof, properly holding that, under some circumstances, no express directions were necessary. The essential circumstances were pointed out, but whether they existed or not was left to the jury.

Counsel's contention that one phase of the charge left it to the jury to determine the legal question of whether Watson and another whose name was mentioned, were partners of appellant and Klauber. There does not seem to be any merit in that claim. There was a controversy as to the facts

regarding the relations between the parties. The court instructed the jury as to the essential facts of a partnership and left it to the jury to determine whether such facts existed or not.

Several other complaints of the charge are found in the exceptions filed. Such exceptions are not in the form contemplated by statute and the decisions of this court. Instead of being made up of concise paragraphs, pointing out, specifically, particular detail portions of the instructions, each covering a single matter, as contrary to law and not warranted by the evidence, the exceptions are, severally, accompanied by an explanation and species of argument, all of which might well have been omitted, though that has not been permitted to prejudice appellant.

It does not seem that further discussion of the exceptions to the charge is called for. Sufficient has been said to indicate a general absence of merit and that failure to discuss the exceptions in an orderly way has not been allowed to work injury to appellant. The charge as a whole, and the exceptions in detail, have been examined without disclosing any error.

The court permitted a paper to be read in evidence which appeared to have been drawn to be signed by *Dow* and Klauber with Watson and another, but was not signed by the first two persons, as bearing, in connection with other evidence, on the relations between such persons. Counsel for appellant failed to point out in the printed case the place where the offer was made and received. In this respect, as well as others we have referred to, and still others which might be referred to, the presentation of the case here is very faulty and imposed much labor upon us to remedy the imperfections and save the rights of the parties. It is to be hoped that the changed practice here, in order to better protect litigants from being prejudiced by the neglects of counsel, will not have a tendency to promote inattention to the

requirements for an orderly, full presentation of such matters as are thought to require judicial review.

The record shows that the unsigned paper was offered in evidence in connection with evidentiary admissions made by appellant that it, though not signed by him and Mr. Klauber, indicated the arrangement under which the parties named therein operated. That seems sufficient on this branch of the case.

Mr. Watson and Mr. Gallagher were permitted to testify as to conversations and transactions which they had with the deceased partner of defendant. It is claimed that was improper under sec. 4070 of the Statutes. Where the evidence of the claimed error may be found is not pointed out. Without going into the matter at length it seems sufficient to say, that neither of the witnesses are in any respect within the prohibitions of the statute. No reason is perceived why the testimony of the two witnesses was not in every respect proper.

Appellant was asked as to whether he ever claimed any horses which were in respondent's possession or authorized the bringing of the North Dakota action, and was not permitted to answer. That was clearly right. There was no claim made that appellant, personally, made a claim for the horses, or that he personally employed attorneys to bring the Dakota action, or specifically directed the commencement of such action. Did he, in legal effect, make such claim and authorize the action by reason of authority possessed by Watson? Those were the matters in controversy. The mere conclusions of the witness which he was requested to give, were the very questions the jury were required to decide.

There are other suggestions of error made by counsel, all of which have been examined, but they seem to have too little merit to warrant further extending this opinion.

*By the Court.*—The judgment is affirmed.

COOPER, Administrator, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

*January 14—February 3, 1914.*

*Appeal: Review of evidence: Motion for new trial after judgment: General verdict: Several grounds of liability: Presumption on appeal: Circumstantial evidence: Sufficiency: Proximate cause: Railroads: Defective crossing: Injury: Husband and wife: Damages.*

1. Where a motion for a new trial is made promptly and in ignorance of the fact that judgment has been entered on the verdict, and the circuit court treats the motion as one made before judgment, and the opposing counsel acquiesce by accepting the advantages of the order made, an exception will be made to the rule that where the motion for a new trial was made after judgment the sufficiency of the evidence to support the verdict will not be considered on appeal from the judgment.
2. Where the evidence tends to establish several grounds of liability, all growing out of the same transaction, which are submitted to the jury for a general verdict, there is no error in the fact that it is impossible to tell upon which ground the verdict is based; and the presumption after judgment is that all the jurors agreed upon some one or all of the several grounds.
3. If in such case there was no request for a special verdict nor for proper instructions which would have eliminated any alleged ground of liability which was insufficiently supported by evidence, the verdict will be deemed to rest upon those grounds of liability which are supported.
4. There must be a basis of fact for countervailing hypotheses before they can be brought forward to weaken or destroy the effect of circumstantial evidence.
5. Where a child fell between the rails at the crossing of a railway track and a sidewalk, evidence of a defective condition of the crossing efficient to cause such a fall would warrant an inference that the fall was caused by such condition; and where a woman attempted to rescue the child and succeeded in throwing it from the track, but in so doing fell in front of an approaching train and was injured, the same considerations would justify a finding that the defective condition of the crossing was the proximate cause of the injury.

**6. In an action by a husband to recover for loss of services and for expenses, etc., caused by an injury to his wife, who was struck by a railway train, an award of $467 (reduced by the trial court from $1,067) is *held* not excessive.**

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The respondent David J. Marshall died this appeal pending, and *Frank Cooper,* his administrator, is substituted as respondent. David J. Marshall brought this action to recover for the loss of services of his wife and the reasonable value of his own services in caring for and nursing her, doctors' bill and hospital expenses, etc. The learned circuit judge instructed the jury at the close of the evidence that the plaintiff based his right to recover upon three alleged grounds of negligence: (1) that the train was running faster than twenty miles per hour while it was within twenty rods of the crossing in question; (2) that the engineer in charge of the train was guilty of negligence in operating the train, in that he did not have it under control as he approached the crossing, and that he was negligent upon the further ground that he had so used the air brake that it was practically exhausted, rendering the emergency brake of no use in attempting to stop the train; and (3) the defendant did not exercise ordinary care in constructing and maintaining the crosswalk where Mrs. Marshall was injured, in that the crossing walk had become old, warped, and decayed so that it was inefficient for public travel. The jury was further instructed that "if the plaintiff has satisfied you, by a preponderance of the evidence, of the existence of any one or more of the three grounds of negligence alleged, then you will have to consider the further question of whether the grounds of negligence found by you are the proximate cause of the injuries sustained by Mrs. Marshall." Proximate cause was then defined and further instructions given. The jury returned a general verdict in favor of the plaintiff and

against the defendant for $1,067 damages, which was on February 26, 1913, by order of the court, reduced to $467. Counsel for defendant requested the court to instruct the jury as follows: "There is no sufficient evidence in the case from which you can find that any defect in the crossing or the planking, or any condition thereof, was the cause of or contributed to the accident in question." This instruction was refused, and to such refusal the defendant excepted. On the coming in of the verdict and before any motion for a new trial, on December 14, 1912, judgment was by the clerk entered in favor of the plaintiff and against the defendant on this verdict in the sum of $1,067. On December 30, 1912, defendant's motion for a new trial was filed, apparently in ignorance of the fact that said judgment had been entered. The motion for a new trial was entertained and considered and on February 4, 1913, an order was made granting a new trial on the ground of excessive damages unless the plaintiff should consent to reduction of the verdict to $467. The plaintiff did so consent, and the judgment was corrected to comply with the order of the court and said consent, and the clerk on February 26, 1913, made an entry at the foot of the judgment to the effect that the judgment was reduced to $467 by order of the court dated February 24, 1913.

*Edward M. Smart,* for the appellant.

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

TIMLIN, J. The foregoing statement of facts seems to be sufficient to present all the questions properly before us on this appeal.

(1) The respondent, relying upon *International T. B. Co. v. Samer,* 151 Wis. 570, 139 N. W. 315; *Kozik v. Czapiewski,* 136 Wis. 70, 116 N. W. 640, and other cases in this court, contends that upon appeal from a judgment, as

here, this court cannot consider the sufficiency of the evidence to support the verdict where the motion for a new trial is made after judgment, and that in such case the question should be presented by appeal from the order denying a new trial. In a case like this where the motion for a new trial was made promptly and in apparent ignorance of the fact that judgment had been entered on the verdict, and the circuit court treats the motion as one made before judgment and counsel opposed acquiesce by accepting the advantages of the order made, there is room for a distinct exception to that rule, which is hereby recognized, and the appeal will be considered on its merits.

(2) Appellant contends that it is impossible to tell whether the jury's verdict for the plaintiff rests upon the first, second, or third ground of negligence of the defendant mentioned above and submitted to the jury. From this he argues that the verdict may rest upon the insufficiency or defective condition of the crosswalk, affirming its insufficiency and its causal relation to the injuries in question. Then going back to the evidence he affirms that there is no evidence showing that this insufficiency of the crosswalk, if it existed, was the proximate cause of the injuries in question, and therefore it was error to refuse the requested instruction above quoted.

Where there is competent evidence tending to establish several grounds of liability, all growing out of the same transaction, which are submitted to the jury, and the latter respond thereunto by general verdict, there is nothing unusual or erroneous in the fact that it is impossible to tell upon which of these grounds the jury found in favor of the prevailing party. 12 Cyc. 693 and cases in note 26; *Nelson v. State,* 52 Wis. 534, 9 N. W. 388; *Grottkau v. State,* 70 Wis. 462, 36 N. W. 31; *Nye v. Otis,* 8 Mass. 122, 5 Am. Dec. 79. Civil cases have been tried and submitted in this manner from the earliest times, and the only doubt appears

to have been with reference to criminal trials, in which the foregoing rule was finally established. The presumption after judgment is that the jury all agreed upon some one or all of the several grounds of recovery and no error on the part of the jury appears. If a party litigant desires to know in such case upon what grounds of fact the verdict is based he must call for a special verdict. But a party may insist upon proper instructions as to each count of the complaint or as to each ground of liability claimed, and thus eliminate any alleged ground of liability which is insufficiently or inadequately presented by the evidence. If there is no special verdict requested and no proper instructions requested, and the evidence makes a case for the jury upon each of the alleged grounds of liability, the question of which ground the jury found against the losing party upon, becomes one of mere academic interest and immaterial in the practical investigations of the law, and if in such case one of the grounds of liability alleged is insufficiently supported by evidence, the verdict will be referred to those grounds of liability which are supported.

There was evidence from which the jury might have found that the planking between the rails of defendant's track, forming part of the sidewalk in question, was defective. There was a space or opening between the inside of the south rail and the next adjacent plank. The third plank was shorter at one end and did not lie up close to the fourth plank, and the fourth plank was warped and curled up in such a way that a traveler on the sidewalk might trip against the upraised edge and fall. The jury viewed the crossing, and photographs thereof are in the bill of exceptions. There was also evidence from which the jury might have found that a group of four, consisting of three adult women and a five-year-old child, were traveling on this sidewalk, two women ahead, and about six feet behind them Mrs. Potter

and the child. On this defective crossing, midway between the rails, the child suddenly fell. The train was approaching rapidly, Mrs. Marshall threw the child off the track and saved its life, but in doing so fell in front of the advancing train. The two women ahead, when the child fell, at once turned back, apparently to save it, and all three women were struck by the train, two of them killed and Mrs. Marshall injured, but the child saved. No express testimony states what caused the child or Mrs. Potter to fall. It is suggested that the child might have been carrying a parasol and that the point of it went down between the plank. There is no positive testimony that the child was carrying a parasol, but a child's parasol was found near or upon the crossing after the accident. Another suggestion is that the child might have stepped on its mother's dress and so tripped and fell, this fall causing the mother to fall. But at the time the child fell it was walking alongside of Mrs. Potter, and if the latter was wearing the ordinary street dress this would not be probable. There must be a basis of fact for countervailing hypotheses before they can be brought forward to weaken or destroy the effect of circumstantial evidence. *U. S. v. Ross,* 92 U. S. 281, 282.

It seems somewhat significant that the child was thrown off the track and out of danger before the train struck the remainder of the group. So that with reference to the cause of the fall we have a question of circumstantial evidence. The fall of the child is proven to have occurred at this particular place. A condition efficient to cause such fall is shown to have existed at this place. No other reasonable hypothesis based on facts in evidence is advanced to account for the fall. There is therefore evidence from which the jury was authorized to infer that the fall was caused by the defective condition of the crossing and justified the rejection of the absolute direction embodied in defendant's re-

quest for instruction. *Thompson v. Johnston Bros. Co.* 86 Wis. 576, 57 N. W. 298; *Hoye v. C. & N. W. R. Co.* 62 Wis. 666, 23 N. W. 14; *S. C.* 67 Wis. 1, 29 N. W. 646.

The same considerations, weakened somewhat by the possibility that Mrs. Marshall might have fallen from fright or excitement in her desperate effort to save the life of the child, and strengthened somewhat by the fact of the fall of the child (if the jury found such fall caused as aforesaid) and her exertions in rescuing the child from imminent and impending danger, accounted for her presence on the track at the critical moment and supplied the premises for a finding of proximate cause. This does not sink to a mere matter of conjecture, it is a weighing of probabilities based upon inferences of fact from other relevant facts properly in evidence.

(3) We do not consider the amount of the verdict as reduced by the learned circuit judge excessive. This last is a question of fact and has support in the evidence and has the weight of the decision of the court below in its favor.

*By the Court.*—Judgment affirmed.

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ESSER, Appellant, vs. BRECKHEIMER BREWING COMPANY and another, Respondents.

*January 14—February 3, 1914.*

*Ejectment: Lease: Evidence.*

**In an action of ejectment, findings of the trial court to the effect that the lease under which defendant justified had not been abrogated, that defendant had exercised an option to continue the lease in force beyond the original term, and that plaintiff had purchased the premises with notice of the lease, are *held* to be supported by the evidence.**

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *John C. Fehlandt* and *Rufus B. Smith,* and oral argument by *Mr. Smith.*

For the respondents there was a brief by *Aylward, Davies & Olbrich,* and oral argument by *J. A. Aylward.*

BARNES, J. This is an action of ejectment. The defendants justified their right of possession under a written lease. The plaintiff contended on the trial (1) that the lease was abrogated by mutual consent; (2) that the defendant corporation failed to exercise an option contained in the lease to continue it in force beyond the period for which the premises had been originally leased, and that therefore the lease had expired by its terms; and (3) that plaintiff purchased the premises without notice that defendant had a lease of the property which extended for a term of years. The court found against the plaintiff on all three of these questions, and it is insisted that such findings have no sufficient support in the evidence.

We are satisfied from an examination of the evidence that it cannot be said that any one of the findings attacked is against the clear preponderance of the evidence. The judgment must therefore be affirmed.

*By the Court.*—It is so ordered.

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GREENEY, Respondent, vs. GREENEY and others, Appellants.

*January 14—February 3, 1914.*

*Wills: Construction: Vesting of estates: Remainders: Partition: Who may maintain action: Judgment: Investment of shares.*

1. A will by which the testator gave to his daughter a life estate in certain land, with remainder to her children, stated: "It is my intention that said property shall be divided at the death of my said daughter among all the children she may

**have at the time of her decease equally, and if any of said children shall die leaving issue prior to my said daughter's death, then that such issue shall take the share which would by the terms of this will have gone to such child had it lived." *Held*, that no interest vested in the remaindermen until the death of the life tenant. The life tenant being still living, the divorced wife of one of the remaindermen, to whom his interest in the land was given by a judgment of divorce, has, therefore, no interest in the land and cannot maintain an action for partition thereof.**

**2. Under sec. 3101, Stats., the estate or interest in land which will entitle a person to maintain an action for partition thereof must be presently vested in him.**

**3. A plain direction, in a will devising land to a life tenant with remainder over, that no division or partition thereof shall be made until after the death of the life tenant, is valid and cannot be disregarded.**

**4. Sec. 3127, Stats., contemplates in a partition action a final judgment of distribution of the proceeds of the sale at the close of the litigation; and the statutes provide for the investment of the shares of absentees, infants, and tenants in dower only, but not for the investment of shares of adult parties to the suit who appear in court.**

APPEAL from an order of the circuit court for Sauk county: W. B. QUINLAN, Judge. *Reversed.*

Action for partition of real estate. In 1870 A. W. Starks died testate devising the land in question to his daughter, Mary Jane Greeney, for life, remainder to her children. The plaintiff married Charles Greeney, a son of the life tenant, and subsequently his interest in the land, if any, was conveyed to her by a judgment of divorce. It does not appear that Charles Greeney is dead, though his place of residence was unknown to his children for more than a year previous to the trial of the case. Mary Jane Greeney, the life tenant, is still alive. The trial court found that plaintiff had a one-fifth interest in the land, subject to the life estate of Mary Jane Greeney, and that the defendants each had a specified fractional like interest therein; also that the interest of each remainderman was subject to be

divested by his dying prior to the death of the life tenant. The court also found that partition could not be made without prejudice to the rights of the owners, and ordered a sale of the land subject to the life estate, and the proceeds of the sale, less costs and attorneys' fees, to be deposited in the Bank of Baraboo to draw current rate of interest, and there to remain till the death of Mary Jane Greeney, unless the court shall otherwise direct. From such order the defendants, who are children or lineal descendants of Mary Jane Greeney, appealed.

*A. J. Gemmill,* for the appellants.

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

A separate brief in support of the judgment of the circuit court was filed by *Bentley, Kelley & Hill,* and the cause was argued orally by *F. R. Bentley.*

VINJE, J. The correctness of the order directing a sale of the farm depends upon whether any estate or interest therein vested in the remaindermen upon the death of the testator, or whether such estate or interest does not vest until the death of the life tenant. The material part of the will relating to this question reads as follows:

"I devise and give unto my daughter Mrs. Mary Jane Greeney, for and during her natural life, my homestead farm [describing it]. . . . It is my intention to give my said daughter a life estate in said property and no more, and I hereby devise and bequeath unto the children of my said daughter the remainder of said property after the determination of her said life estate, to be equally divided among her said children, share and share alike, and to their heirs forever. It is my intention that said property shall be divided at the death of my said daughter among all the children she may have at the time of her decease equally, and if any of said children shall die leaving issue prior to my said daughter's death, then that such issue shall take the share which would by the terms of this will have gone

to such child had it lived. It is my wish that said homestead farm should remain in my family."

Conceding that the words therein "I hereby devise and bequeath unto the children of my said daughter the remainder of said property after the determination of her said life estate, to be equally divided among her said children," standing alone, may be construed as a present gift, they are also susceptible of the construction that the gift is not to take effect until after the death of his daughter. That the latter was intended is made clear by the language which follows. It provides that the division shall take effect upon her death, and that only those of her children then alive shall share therein. Realizing that such a disposition of the property would cut off the issue of any child dying before his daughter, he provided specifically for such issue taking the share which would have gone to such child had it lived, clearly indicating that those children who did not survive their mother took nothing; that no interest vested in them upon the death of the testator, but only upon the death of his daughter; and that not until the happening of that event could the legatees in whom an estate was to vest be definitely ascertained. The correctness of this construction is emphasized by the expressed wish that the homestead farm remain in his family. We have, therefore, a will that by clear and explicit language postpones the vesting of any interest in the remaindermen until the death of the life tenant. That being so, the statute as to the vesting of estates cannot change its effect. *Moran's Will,* 118 Wis. 177, 193, 96 N. W. 367; *Cashman v. Ross, ante,* p. 558, 145 N. W. 199.

It follows that the judgment of divorce which gave to the plaintiff Charles Greeney's interest in the farm conveyed to her nothing, for he had no interest to be conveyed at the time the decree was entered, and plaintiff has now no interest in

the land and is therefore incapable of maintaining an action for the partition of the same.

Sec. 3101, Stats. 1913, does not provide to the contrary. Its language is that "Such action may be maintained by any person who has any estate in the lands of which partition is sought." Before a person can have "any estate" in the lands, within the meaning of the section, it is necessary that some estate or interest therein has vested in him before the commencement of the action, though he may not be entitled to the right of immediate possession and though such estate or interest may be subject to be divested. It is not sufficient that at some time in the future an estate or interest therein may vest in him. Such estate or interest must be in him presently in order to entitle him to maintain partition. *Cashman v. Ross, ante,* p. 558, 145 N. W. 199; *Aydlett v. Pendleton,* 111 N. C. 28, 16 S. E. 8; *Seymour v. Bowles,* 172 Ill. 521, 50 N. E. 122; *Ruddell v. Wren,* 208 Ill. 508, 70 N. E. 751; *Wicker v. Moore,* 79 Neb. 755, 113 N. W. 148; 30 Cyc. 183.

There is another good ground for holding that an action for partition cannot now be maintained even if the remaindermen had vested interests, and that is, the testator by his will plainly directed that no division or partition thereof should be made until after the death of his daughter. Such a provision contravenes no law or sound public policy and must control. Courts have no more right to disregard such a provision of a will than they have to disregard any other valid provision thereof clearly expressed. *Elberts v. Elberts* (Iowa) 141 N. W. 57; *Ward v. Ward,* 163 Mich. 570, 128 N. W. 761; Freeman, Cotenancy & Partition, § 439; 30 Cyc. 185. In the present case no exigency for partition had arisen. Indeed, no partition could in fact be made. The trial court realized this by directing that the proceeds of the sale should be deposited in a bank and await the death of the life tenant before the same could be divided. Sec. 3127, Stats. 1913,

contemplates a final judgment of distribution of the proceeds of the sale at the close of the litigation, and the statutes provide for the investment of shares of absentees, infants, and tenants in dower only, but not for the investment of shares of adult parties to the suit who appear in court.

*By the Court.*—Order reversed, and cause remanded with directions to dismiss the complaint.

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BUTLER, Appellant, vs. JOINT SCHOOL DISTRICT NO. 4 OF THE TOWN OF WINDSOR AND VILLAGE OF DE FOREST, Respondent.

*January 15—February 3, 1914.*

***Schools and school districts: Primary department: What grades included: School board: Informal meeting.***

1. **The primary department of a public school does not include the sixth, seventh, and eighth grades, and one who contracts to teach the primary department cannot be required to teach said grades in their grade work, even though the classes be sent to the primary room.**
2. **When all the members of a school board are present, official action may be taken although the meeting be not formally called or the action formally recorded in the minutes.**

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to recover damages for breach of contract. The evidence of plaintiff showed that she was a duly qualified school teacher and entered into a written contract with the defendant school board in July, 1912, to teach "the primary department of the state graded school of said district" for the school year commencing September 9, 1912, for the sum of $55 per month; that she taught one day and was required by the principal, in addition to her primary work, to instruct classes from the sixth, seventh, and eighth grades in the work

of their respective grades, which classes were sent down to the primary department from the intermediate and grammar departments, and that she taught the said classes on that day, but declined to do so in the future unless she received extra compensation, because she had not contracted to do such work. The evidence further tended to show that an informal meeting of the district board was held on the same evening at which all the members were present and the subject was considered, and it was agreed by all the members, in substance, that the plaintiff was required, under her contract, to teach the classes so sent to the primary department without extra pay, and that she should be notified by Mr. Karow (one of the board) of the action; that she was so notified on the same evening; that she declined to teach further on account of this requirement, but notified the board that she was ready and willing to teach the primary grades; that she received her pay for one day's teaching, and taught no more on account of the requirement that she must teach the aforesaid higher grades. There was also evidence of substantial damage suffered by reason of her being deprived of employment, but it is unnecessary to state it. The circuit court nonsuited the plaintiff at the close of her evidence, and the plaintiff appeals.

For the appellant there was a brief by *Anna B. Hull,* attorney, and *D. W. McNamara,* of counsel, and oral argument by *Mr. McNamara.*

For the respondent there was a brief by *Ollis, Nelson & Bushnell,* and oral argument by *R. N. Nelson.*

WINSLOW, C. J. The legal propositions decided in this case are:

1. The primary department of a public school does not include the sixth, seventh, and eighth grades, and one who contracts to teach the primary department cannot be required to teach said grades in their grade work, even though the classes be sent to the primary room. If there was any doubt as to

what grades in our school system are primary grades that doubt is removed by sec. 452*c*, Stats. 1913, which names the first four grades as such grades.

2. The evidence was sufficient to take to the jury the question whether the board prevented the plaintiff from proceeding to fulfil her contract to teach the primary department. When all the members of the board are present, official action may be taken although the meeting be not formally called or the action formally recorded in the minutes.

*By the Court.*—Judgment reversed, and action remanded for a new trial.

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HILSENHOFF, Appellant, vs. FASS and others, Respondents.

*January 15—February 3, 1914.*

***Master and servant: Injury from unguarded machinery: Contributory negligence as a defense: Special verdict: Finding construed: Instructions to jury.***

1. Ch. 396, Laws of 1911, amending sec. 1636*jj*, Stats., so as to make the duty of an employer to guard dangerous machinery an absolute one, did not abolish the defense of contributory negligence.
2. In an action for injuries to an employee whose fingers were cut off by unguarded revolving knives of a jointer machine which he was operating, a finding by the jury that want of ordinary care on the part of plaintiff proximately contributed to cause the injury is *held* not to have been merely a finding of assumption of risk.
3. In the light of the evidence—showing that before the injury plaintiff removed from the machine a guard which had been provided by defendants, and that the exposure of a large portion of the knives was caused by the manner in which he operated the machine—the charge to the jury, taken as a whole, is *held* not to have been misleading, but to have made it plain that plaintiff could be found guilty of contributory negligence only in case he was so negligently operating the machine as to contribute to his injury.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to recover for personal injuries. The plaintiff, on October 17, 1911, while operating a jointer machine and in the employ of the defendants, was injured. The negligence alleged is that the defendants failed to furnish a safe place for plaintiff to work, failed to keep such place safe, and failed to guard said machinery. The jury returned the following verdict:

"(1) Were the knives of the jointer so located as to be dangerous to employees in the discharge of their duty? *A.* Yes.

"(2) If you answer question 1 'Yes,' did defendants fail to securely guard the knives? *A.* Yes.

"(3) If you answer question 2 'Yes,' did defendants fail to exercise ordinary care in the manner in which they guarded the knives? *A.* No.

"(4) If you answer either or both questions 2 and 3 'Yes,' was such failure the proximate cause of plaintiff's injury? *A.* Yes.

"(5) Did want of ordinary care on the part of the plaintiff proximately contribute to cause the injury which he sustained? *A.* Yes.

"(6) What sum will compensate plaintiff for the injury which he sustained? *A.* $2,500."

The court directed judgment for the defendants upon the verdict. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Gilbert & Ela,* and oral argument by *F. L. Gilbert.*

For the respondents there was a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

KERWIN, J. The errors assigned are (a) in instructing the jury; (b) in refusing to direct judgment on the verdict for the plaintiff; (c) in refusing to set aside the verdict and grant a new trial; (d) in ordering the complaint dismissed.

As we have seen, the jury found that the plaintiff was guilty of contributory negligence. Notwithstanding this

finding it is insisted on the part of the appellant that judgment should have been directed for the plaintiff upon the verdict. This contention is based upon the theory that under the law as it stood at the time of the injury the defendants were absolutely liable in case of failure to properly guard machinery. It is argued that ch. 396, Laws of 1911, takes away the defense of contributory negligence and assumption of risk, and that the answer of the jury to the fifth question in the special verdict merely amounts to a finding of assumption of risk. It is true that the defense of assumption of risk has been abolished by the existing statutes. But contributory negligence was a defense at the time of the injury in question. It is very obvious that the amendment referred to and passed shortly after the decisions of this court in *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992, and *Willette v. Rhinelander P. Co.* 145 Wis. 537, 130 N. W. 853, was intended to change the rule with respect to guarding machinery from that of ordinary care to absolute duty, but did not abolish the defense of contributory negligence.

Nor can the contention of counsel that the finding of the jury was merely a finding of assumption of risk be sustained. The jury found explicitly that the plaintiff was guilty of contributory negligence. The question was fairly submitted to the jury and there is ample evidence to support it. It follows, therefore, that no judgment could be rendered in favor of the plaintiff upon the verdict, but on the contrary the defendants were entitled to judgment on the ground of contributory negligence on the part of the plaintiff.

It is further insisted by counsel for appellant that the court erred in giving the following instruction:

"If you find that the plaintiff's hand was injured on the portion of the knives which was not covered by the piece of wood which he was passing over the knives, and you further find that the machine was so set that about eleven inches of the knives were exposed between the front of the machine

and the guide at the back of the machine, then also your answer will be 'Yes.' "

The evidence shows that the plaintiff before the injury removed a guard from the machine which had been provided by defendants, and that the exposure of a large portion of the knives was caused by the manner of operation of the machine by the plaintiff. Moreover, the portion of the instructions excepted to, when read in connection with that preceding and that following, clearly could not have misled the jury. Immediately preceding the portion excepted to is the following:

"In answering this fifth question you will consider the evidence as to the guard furnished by the defendants and the knowledge of its use possessed by the plaintiff, together with all the other facts established by the testimony bearing upon this question.

"It was the duty of the plaintiff to use this guard whenever its use would have lessened the danger of accident. If you find that if the plaintiff had used the guard at the time he was injured and covered the uncovered or open portion of the knives the accident would not have happened—if that be your finding, your answer to this question must be 'Yes.' "

Following the portion of the charge excepted to is:

"If the defendants have satisfied you by a preponderance of the evidence that want of ordinary care on the part of the plaintiff proximately contributed to cause the injury which he sustained, your answer will be 'Yes,' otherwise your answer will be 'No.' "

It will be seen from the foregoing instructions that the court made plain to the jury that they could find plaintiff guilty of contributory negligence only in case they found that he was so negligently operating the machine as to contribute to his injury. We find no reversible error in the record.

*By the Court.*—The judgment of the court below is affirmed.

MEADE, Respondent, vs. DANE COUNTY, imp., Appellant.

*January 15—February 3, 1914.*

*Statutes: Construction: "Resolutions" of county board, etc.: Constitutional law: Direct legislation in counties and cities: Referendum review of acts of county board, etc.: Delegation of administrative, legislative, and judicial powers.*

1. The words "ordinance or resolution" in sub. 1, sec. 39*j*, Stats., which provides for a referendum review of acts of the county board of supervisors, cover all exercise of power by the county board which lawfully may be or is exercised in the form of a resolution.
2. Oral motions when adopted by the county board become resolutions or orders of that body, and are within said statute.
3. Emergency resolutions, among which are included those which make appropriations for maintaining the county government or any public institution, although they take effect at once, either in whole or in part according to circumstances, appear to be, equally with other resolutions of the supervisors, subject to the referendum review provided for in said act.
4. In the exercise of many administrative, local legislative, and *quasi*-judicial functions, the county board acts, by delegated authority, as an administrative unit of the state, by virtue of sec. 22, art. IV, Const.; and sec. 39*j*, Stats., is invalid because it attempts to delegate to the electors administrative powers which by said section of the constitution are required to be delegated, if at all, to the county board.
5. As to emergency resolutions, the effect of said sec. 39*j* is to confer upon the electors of the county the legislative power of repeal, and for that reason it is in violation of sec. 22, art. IV, Const., and void.
6. Said sec. 39*j* grants the power of annulling or repealing ordinances as well as resolutions, and this is a delegation of legislative power and forbidden by the constitution.
7. So far as said sec. 39*j* grants to the electors the power to review and reverse the otherwise final decisions of the county board acting in a *quasi*-judicial capacity, it is a delegation of judicial power, which is also forbidden by the constitution.

APPEAL from a judgment of the circuit court for Dane county: GEORGE GRIMM, Judge. *Reversed.*

The plaintiff, a resident and taxpayer of *Dane County,* brought this action in behalf of himself and all other tax-

payers of the county against said county and Robert W. Davis, county treasurer thereof, William Pierstorff, the chairman of the board of supervisors, and also against William Dreger and his wife, from whom the county intends to purchase land. January 30, 1913, the county board of supervisors, then in regular session, approved the report of a special committee of its members recommending the purchase of a farm from the defendant Dreger adjoining the county poor farm, for an addition thereunto. The record of this proceeding was as follows: "The board then voted on the purchase of the Dreger farm. Adopted. Ayes 38, noes 4." On January 31, 1913, the board took action evidenced in the record of their proceedings as follows: "The board then took up the resolution of Mr. Thinnes appropriating money for the purchase of the Dreger farm. The resolution was unanimously adopted on a call of the ayes and noes as follows:" (Here follows the call vote.) The record of the third proceeding is as follows: "Mr. Thinnes moved that the chairman, clerk, and district attorney be authorized to complete the purchase. Carried."

On February 18 and 19, 1913, three petitions, each containing the signatures of electors of *Dane County* equal in number to more than twenty per cent. of the votes cast for governor in said county at the last preceding election, were filed with the county clerk. One of the petitions referred to the action of the county board mentioned authorizing the purchase of said Dreger farm, one to the resolution of the county board mentioned appropriating the sum of $24,200 for the purchase of said Dreger farm, and another to the action of the county board mentioned authorizing the chairman of the board, the county clerk, and the district attorney to complete the purchase of the farm. In the petitions each of these acts of the county board was called a resolution, and each petition prayed that the operation of each of the aforesaid resolutions be suspended pursuant to sec. 39*j*, Stats.

1911. On March 13, 1913, the county board met in special session and the clerk presented to the board the aforesaid petitions, together with a certificate showing that the petitions had been properly signed by the requisite number of electors and duly verified, but the county board neither repealed the so-called resolutions referred to in said petitions nor provided for the submission of either of said resolutions to a vote of the people at any election as provided for in sec. 39*j*. The county board ignored the petitions, and the record of their proceedings at the said session of March 1st contains the following:

"The clerk read the following letter from William Dreger and Hannah Dreger, his wife:

"*To Dane County; to Wm. H. Pierstorff, Chairman Dane County Board; to G. J. Fjelstad, County Clerk:*

"In compliance with a certain land contract entered into February 4, 1913, between the undersigned and the county of *Dane,* by its proper officers, and by virtue of authority vested in said officers by the Dane county board, the undersigned hereby tender the said *Dane County,* duly and properly executed, deeds of the land described in said contract, vesting marketable title in *Dane County,* together with an abstract of said property complete to date of transfer, and demand in return therefor the sum of twenty-three thousand one hundred and twenty dollars in cash.

"WILLIAM DREGER.
"HANNAH DREGER.

"By Gilbert, Jackson & Ela, their Attorneys."

A county order for $1,000 had been theretofore issued to the Dregers in part payment and was paid, and a county order for the remainder of $23,120 was issued but its payment arrested by this suit.

The learned circuit judge held the proceedings for the purchase of this farm void and gave judgment restraining the defendants from completing the purchase of said farm or paying the remainder of the purchase price or any part thereof until such time as the resolutions providing for the

purchase of the farm, appropriating the money therefor, and authorizing the proper officers to make and complete the purchase should have been submitted to and approved by the electors of *Dane County* at a general or special election. It was further decreed that the county of *Dane* recover from the defendant William Dreger the said sum of $1,000 paid and that the plaintiff recover costs. The county appeals from the judgment.

Sec. 39*j*, Stats., reads as follows:

"1. No ordinance passed by the council of any city, except of such cities as are organized under sections 925*m*—301 to 925*m*—317, inclusive, of the statutes, and no ordinance or resolution of any county board shall go into effect within twenty days from the time of its passage, but emergency ordinances and resolutions may be made to take effect at a time prescribed in such ordinance or resolution.

"2. An emergency ordinance or resolution shall be any ordinance or resolution, declared by a two-thirds vote of the members elected to the city council or county board, to be necessary for any immediate purpose, or any ordinance or resolution making any appropriation for maintaining the city or county government or maintaining or aiding any public institution. The part of such appropriation, not exceeding the next previous annual appropriation for the same purpose, shall take effect and be available at the time fixed by law. The increase in any such appropriation shall only take effect as in the case of other ordinances or resolutions, and such increase or any part thereof specified in the petition may be referred to a vote of the people upon petition.

"3. If within twenty days after the passage and publication of any ordinance or resolution, a petition, signed by qualified electors of the city or county equal in number to at least twenty per cent. of all the votes cast for governor in such city or county at the last preceding regular election, shall be filed with the city or county clerk and certified by him to the city council or county board, praying that the operation of such ordinance or resolution be suspended, the operation of such ordinance or resolution, unless the same shall be an emergency ordinance or resolution, shall be sus-

pended. At its next regular meeting, or at a special meeting prior to the time of its regular meeting, the city council or county board shall consider such ordinance or resolution, and either repeal it or submit it to the electors of the city or county at the next regular election or at a special election to be called for that purpose, if no such general or special election shall be held within ninety days. If any such ordinance or resolution shall be approved by a majority of the electors voting thereon, it shall take effect and be in force from and after twenty days from the date of the election.

"4. An emergency ordinance or resolution shall remain in force notwithstanding any petition filed upon it, but such ordinance or resolution shall stand repealed from and after twenty days after being rejected by a majority of the qualified electors voting thereon.

"5. Nothing contained in this section shall apply to any city ordinance which grants a franchise for a public utility, or authorizes the issue of municipal bonds."

*Robert N. Nelson,* attorney, and *Sam T. Swansen,* of counsel, for the appellant, contended, *inter alia,* that sec. 39*j,* Stats., applies only to such acts as were required to be done by ordinance or by resolution partaking of the same nature, and does not embrace motions such as were here in question. Beach, Pub. Corp. § 484; 1 Dillon, Mun. Corp. (5th ed.) § 307; *Altamont v. B. & O. S. W. R. Co.* 184 Ill. 47, 56 N. E. 340; *Fuller v. Scranton,* 1 Pa. Co. Ct. Rep. 405, 407; 6 Words & Phrases, 5026; 7 id. 6173; *Campbell v. Cincinnati,* 49 Ohio St. 463, 31 N. E. 606. The statute is unreasonable, inconsistent, and uncertain, and hence void. *State v. Wentler,* 76 Wis. 89, 44 N. W. 841, 45 N. W. 816; *Wentworth v. Racine Co.* 99 Wis. 26, 74 N. W. 551. It is unconstitutional as a delegation of legislative power to the electors. *In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 65 N. W. 738; *Slinger v. Henneman,* 38 Wis. 504; *Parks v. Wyandotte Co.* 61 Fed. 436; Cooley, Const. Lim. (7th ed.) 137, 248.

For the respondent there was a brief by *Welton & Marks,* and oral argument by *C. R. Welton* and *C. E. Marks.* As to the meaning of the words "ordinance" and "resolution," they cited 2 Dillon, Mun. Corp. (5th ed.) § 571; *Altamont v. B. & O. S. W. R. Co.* 184 Ill. 47, 56 N. E. 340; *McDowell v. People,* 204 Ill. 499, 68 N. E. 379, 381; *Paxton v. Bogardus,* 201 Ill. 628, 66 N. E. 853; *Cape Girardeau v. Fougeu,* 30 Mo. App. 551, 556; *Tracey v. People,* 6 Colo. 151, 153; *Fuller v. Scranton,* 2 Sad. (Pa.) 61, 4 Atl. 467, 469.

TIMLIN, J. By sub. 1 of sec. 39*j,* Stats., no ordinance passed by the council of any city except such cities as are organized under secs. 925*m*—301 to 925*m*—317, inclusive, of the statutes, and no ordinance or resolution of any county board, shall go into effect within twenty days from the time of its passage. This would seem to apply only to ordinances of a city council and ordinances or resolutions of a county board were it not for sub. 3, which in apparent forgetfulness of sub. 1, which provides no stay of twenty days for resolutions of a city council, permits, nevertheless, a petition by qualified electors of the city praying that the operation of such resolutions be suspended, and provides for their suspension. Cities referred to in secs. 925*m*—301 to 925*m*—317 are those organized under the so-called commission form of government. Upon petition of a stated number of qualified electors filed with the city or county clerk, as the case may be, the city council or county board must at its next meeting either repeal the ordinance or resolution or submit it to the electors at the next regular election, or at a special election to be called for that purpose if there is no general election or no special election for other purposes to be held within ninety days. If the ordinance or resolution shall be approved by a majority of the electors voting thereon it shall take effect and be in force after twenty days from the date

of the election. If it be not so approved *it shall stand repealed from and after twenty days next following the election.* The contention of counsel for respondent is that this applies to all ordinances and all resolutions of any kind and upon any subject except those granting a franchise for a public utility or authorizing the issue of municipal bonds. The contention is that the statute applies to resolutions of condolence or of thanks, resolutions of adjournment, for the purchase of lead pencils, stamps, or stationery, for the repair of roads, for the relief of the poor, for the sale of tax certificates, for the settlement of a cause of action, the repair of county buildings or their insurance, the apportionment and levy of taxes or the manner and form of keeping the public records, the encouragement of agricultural fairs or the purchase of land, the making of the lists of jurors or the borrowing of money, the diet of the inmates of the jail or the publication of the proceedings of the county board, the fees of officers and magistrates in vagrancy prosecutions had before them, the vacation and change of the boundaries of towns, the laying out and discontinuing of roads, the allowance of bounties for the destruction of wild animals, the change of the name of any town or village or person, the vacation of any city, town, or village plat, the granting of charters to build and maintain toll and free bridges, the incorporation of literary, benevolent, charitable, and scientific institutions, the granting of charters and conferring of corporate powers upon turnpike companies, the establishment of dock or wharf lines upon navigable waters, the erection of monuments to the memory of distinguished citizens of the county, the procuring of transcripts or abstracts of the records of other counties affecting the title of real estate, the making of leases, contracts, or other conveyances in relation to lands acquired for public purposes, and the many other matters of a temporary or administrative nature which

might be acted upon by a county board of supervisors or by the common council of a city. Ch. 36, Stats.

In the case of a large city where the common council meets fortnightly, after the lapse of the first ninety days it would be in the power of twenty per centum of the electors to enjoy an election in each alternate week in review of the resolutions of the city council, and another series of county elections sandwiched in between these numerous city elections to review the resolutions of the county board of supervisors adopted at one of its numerous meetings. Taken literally the statute reads that way. To those who enjoy elections it gives promise of almost unlimited hilarity; to those who pay the bills almost unlimited expense. But it is contended that the good sense of the people would be a sufficient safeguard against such a superabundance of elections. This is in effect an argument that the good sense of the people at election is superior to the good sense of the statute as well as to the good sense of the city council or county board. If the statute authorizes such a condition of affairs its validity cannot be tested by any such consideration as this. An invalid statute is not rendered valid merely because those whom it attempts to authorize will probably have too much good sense to avail themselves of such authority. The plaintiff is here endeavoring to assert rights under this statute.

It is noticeable in scanning this statute that all ordinances and resolutions, whether of the class called "emergency ordinances and resolutions" or not, are subject to this referendum review, the only difference being that an emergency ordinance or resolution goes into effect immediately, while all others do not go into effect until twenty days from the time of their passage, and perhaps not then if the petition for an election is filed. But there is a referendum review in either case. An emergency ordinance or resolution is described as one declared by a two-thirds vote of the mem-

bers elected to the city council or county board to be necessary for some immediate purpose, or else an ordinance or resolution *making an appropriation for maintaining the city or county government or maintaining any public institution.* In ordinances or resolutions of this description the part of such appropriation not exceeding the next previous annual appropriation for the same purpose shall take effect and be available at the time fixed by law, apparently discriminating between the time fixed by law and the time fixed by this statute. The increase in any such appropriation, however, shall only take effect as in the case of other ordinances or resolutions, and such increase or any part thereof specified in the petition may be referred to a vote of the people upon petition. This last would seem to indicate that only such increase or only such part thereof as was specified in the petition might be referred to a vote of the people. But sub. 3 includes all ordinances or resolutions, and sub. 4 provides that "an emergency ordinance or resolution shall remain in force notwithstanding any petition filed upon it, but such ordinance or resolution shall stand repealed from and after twenty days after being rejected by a majority of the qualified electors voting thereon." This last is general and apparently applies to all emergency ordinances; therefore includes ordinances making appropriations for maintaining the city or county government or maintaining or aiding any public institution as defined in sub. 2.

With a view to upholding this statute we have diligently scanned it for some limitation upon this general right of appeal from the laws or resolutions of the city council or county board to the city or county electors. But having due regard to the language employed and the nature of the subject legislated upon, we find none, and, as heretofore stated, counsel for respondent will admit of none. We cannot limit it to those doings of the board which are required by law to be published, because that requirement covers all the pro-

ceedings. Appellant's counsel argue that this referendum review must be limited to such exercise of power by the county board or city council as other statutes require to be exercised by ordinance or resolution. Hence, there being no such requirement concerning the proceedings in question, there was no right of referendum review under sec. 39*j*. Of the statutes, sec. 653 provides that the county board may by ordinance or resolution direct the clerk to sell and convey certain real estate; sec. 658 negatively that bonds shall not be issued except in pursuance of a resolution or ordinance; sec. 668 that the board may by resolution authorize the chairman to appoint committees; sec. 670 that all powers thereby conferred shall be carried into effect by ordinance; sec. 671*m* speaks of ordinances or resolutions for the division, etc., of towns; sec. 694 authorizes the county board to change by resolution the manner of compensating the sheriff; sec. 697*v* extending the duties of certain trustees by resolution; sec. 697—1 provides for acquiring land upon which to maintain a house of correction and providing by resolution for such acquisition; sec. 697—32 *et seq.* for expressing by resolution an opinion that it is for the best interests of the county and the inhabitants thereof that a viaduct or bridge be erected, etc.; sec. 697—40 that the board may by resolution direct the chairman to sign and the clerk to countersign bonds; sec. 1519 that the county board may by resolution abolish the distinction between county poor and town poor, etc. At the same time secs. 654, 656, 669, 682, 690, 693, 694, 697*a*, 697*o*, 697—5, 697—11, 697—15, 697—18, 697—22, 697—23, and other sections, authorize the board, without mentioning the manner of exercise, to "fix and designate," to "appoint," to "order," to "direct," to "prescribe," to "perform," to "grant," to "make," to "establish," etc. These different modes of expressing the authority conferred upon the board by the legislature seem to be entirely haphazard and cannot be classified either with reference to

the object to be acted upon or with reference to the nature of the power exercised. The statutory requirement or permission that the act be by ordinance or resolution has no apparent relation to the desirability of or to the right of a referendum review. Besides, it was held in *Green Bay v. Brauns,* 50 Wis. 204, 6 N. W. 503, that when an oral motion is adopted by the common council it becomes a resolution or order of that body. See, also, *El Paso G., E. L. & P. Co. v. El Paso,* 22 Tex. Civ. App. 309, 54 S. W. 798; *Pierson v. Dover,* 61 N. J. Law, 404, 39 Atl. 675.

While there are in some instances and for some purposes fundamental distinctions between an ordinance and a resolution, there is no such broad distinction between a resolution and other acts of an administrative or *quasi*-legislative board. Almost any one of these acts not required to be by ordinance may be in the form of a resolution. *Alma v. Guaranty Sav. Bank,* 60 Fed. 203, 8 C. C. A. 564.

We are led to the conclusion that the words "ordinance or resolution" cover all exercise of power by the county board which either may lawfully be or is exercised in the form of a resolution, and hence that the acts in question are within sec. 39*j*. The county board for many purposes and in the exercise of many administrative, local legislative, and *quasi*-judicial functions represents the county as a local government and also as an administrative unit of the state. Instead of conferring authority upon an officer as is done under other systems, the state avails itself of its local subdivisions and the officers thereof to administer locally laws of general character in the administration of which all the people of the state are interested, such as the maintenance of highways, public charities, support of the poor, schools, and police regulations generally. In the exercise of such power the county acts by delegated authority, and the state constitution (sec. 22, art. IV) expressly authorizes the legislature to confer upon the boards of supervisors of the several

counties "such powers of a local, legislative and administrative character."

The question arises whether the legislature could make such powers of the county board so conferred, which affect the whole people of the state and the state itself in its sovereign capacity and which the county through its board of supervisors exercises as an administrative unit or officer of the state, take effect upon the contingency that only the voters of a single county approve it at an election? Again, the county board may allow or disallow the claim of any person against a county. Secs. 676 to 682. Suppose it allows the claim. No appeal to the courts is authorized in such case. May the matter then go by referendum to the electors to disallow it? In many other cases the county board is authorized to act in a *quasi*-judicial capacity upon rights of action. Is it due process of law to permit the electors to determine such matters? These questions have not been argued and we express no opinion upon them. It is clear, however, that the action or resolution of the county board in question is, within the terms of sec. 39*j*, an emergency order or resolution, because it makes an appropriation for or is in aid of a public institution, and that by sub. 4 the action of the county board is not merely to go into effect upon the contingency that a majority of the electors declare it, but, on the contrary, takes effect from the time of its passage and is repealed by the action of the electors in case the majority so decide. We think there is no doubt that this is the clear meaning of the law. This is not making the decision of the board go into effect only upon condition. It is delegating to the electors the legislative power of repeal. Moreover, it is vesting in the electors of the county the powers which the constitution says may be vested in the county board. The constitution provides for and authorizes a delegation of such powers to a specified body. *Expressio unius est exclusio alterius.* In that sec. 39*j* conflicts with the constitution.

*Ex parte Vallandigham,* 1 Wall. 243, 252; *State ex rel. Crawford v. Hastings,* 10 Wis. 525, 531.

In at least these respects, therefore, this statute conflicts with the constitution: (1) because it violates sec. 22 of art. IV in attempting to delegate to the electors powers which that section, interpreted by the regular rules of interpretation applied in the *Vallandigham Case* and in the *Hastings Case, supra,* requires to be otherwise delegated; (2) because as regards emergency resolutions there defined, which includes the resolutions in question here, the statute is an attempted delegation of the legislative power of repeal. In this latter respect the case is unlike *State ex rel. Van Alstine v. Frear,* 142 Wis. 320, 125 N. W. 961, and cases there cited, where the legislation was to go into effect upon the occurrence of a designated event such as the result of an election. (3) Sec. 39*j* grants to the electors of the county the power to repeal and annul ordinances as well as resolutions. The grant is inseparable. As to all ordinances, and as to those resolutions which are in effect ordinances, declared by said section to be in force and effect until repealed by the electors, this is a delegation of legislative power and forbidden by constitutional law. As to some other resolutions it is a delegation of judicial power and likewise forbidden. The power to review and reverse the otherwise final decisions of an administrative officer or department or of a *quasi*-judicial tribunal is judicial power expressly conferred elsewhere (sec. 8, art. VII, Const.). Therefore it cannot be conferred upon the electors under the rule hereinbefore referred to. *State ex rel. Crawford v. Hastings,* 10 Wis. 525, 531; *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 578 (88 N. W. 596, 90 N. W. 1067), and cases cited. See, also, pp. 580, 581.

Hundreds of illustrative instances going back to the earliest times showing the exercise of such power by the judicial department might be cited. Even the judicial power in this

direction is limited. As to all other resolutions of the county board this is a delegation of administrative power, and this class of powers the constitution, sec. 22, art. IV, permits to be delegated only to the county board. Besides the indications of intention in this respect appearing upon the face of the constitution by ordinary and fair interpretation there are fundamental reasons. The action of the board of supervisors might in a proper case be coerced by *mandamus*. The electors could not be compelled to vote aye or nay. The state would in the latter case then surrender to the voters in one county its right and duty to administer the laws in the instances mentioned in which the whole people of the state are interested. The voters might refuse to provide prisons or workhouses, hospitals, highways or schools or courthouses, support of the poor, or police protection, and the state would be powerless if this statute were valid. The statute in question seems to have been framed in entire unconsciousness of fundamental principles, and we have no reasonable doubt of its invalidity. No other questions need be considered.

*By the Court.*—Judgment reversed, and the cause remanded with directions to dismiss the complaint.

BARNES, J., dissents.

# INDEX.

## ABATEMENT AND REVIVAL.

*Death of party: Survival of action.*

1. The statutory cause of action given by secs. 4255, 4256, Stats., for the death of a person by the wrongful act, neglect, or default of another does not survive the death of the wrongdoer. *Kranz v. Wisconsin Trust Co.* 40
2. Such cause of action is not, within the meaning of sec. 4253, Stats., given for any "damage done to the property rights or interests" of the beneficiaries named in said sec. 4256, but as a new and independent cause of action unknown to the common law, and hence is not included in survival statutes using terms applicable only to common-law actions. *Ibid.*

*Same: Appealable orders: Abuse of discretion.*

3. An order reviving an action against the personal representatives of a deceased party is appealable. *R. G. Uhlmann Fur Co. v. Gates,* 385
4. Such an order, being in a matter within the sound discretion of the trial court, will not be disturbed unless that discretion was abused. *Ibid.*
5. In this case, there having been a long delay in bringing the action to trial and a long delay, after defendant's death, in moving to revive it, and it being apparent that the defense practically died with the defendant, it is *held* that it was an abuse of discretion, under all the circumstances, to revive the action. *Ibid.*

ABUSE OF DISCRETION. See ABATEMENT AND REVIVAL, 4, 5. APPEAL, 22. COSTS, 1. DAMAGES, 9. DISCOVERY, 3. NEW TRIAL, 1.

ABUSE OF WRIT. See HABEAS CORPUS, 4.

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*By whom brought: Who may maintain.* See EQUITY, 1. JUDGMENT, 3–6. OFFICERS, 5. PARTITION, 1. SCHOOLS AND SCHOOL DISTRICTS, 3. TAXATION, 1, 11. WILLS, 5, 8.

*Abatement and revival.* See ABATEMENT AND REVIVAL.

*Consolidation of actions.*

The question of consolidation of actions is always one of discretion with the trial court. *Whalen v. Eagle L. P. Co.* 26

ADMINISTRATIVE POWERS. See CONSTITUTIONAL LAW, 1–4.

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AMBIGUITIES. See CONTRACTS, 6.

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ANSWER. See JUDGMENT, 3. PLEADING, 6–8.

ANTICIPATION. See FIRES, 2, 3. MASTER AND SERVANT, 4, 24.

## APPEAL AND ERROR.

*What courts may issue writs of error.*

1. A writ of error from the circuit court for Milwaukee county will not lie to review a judgment of the civil court of said county. *Ætna Accident & L. Co. v. Lyman,* 135
2. Sec. 21, art. I, Const., providing that "writs of error shall never be prohibited by law," was intended merely to preserve the right to issue the writ as it existed in the territory of Wisconsin when the constitution was adopted, and hence continues such right in the supreme court only. *Ibid.*
3. Neither the grant of appellate jurisdiction to the circuit courts nor the grant of power to issue certain specified writs "and all other writs necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions" (sec. 8, art. VII, Const.), confers the right to issue a writ of error. *Ibid.*

*Decisions reviewable: Appealable orders.* See ABATEMENT AND REVIVAL, 3. CONTEMPT, 1. DISCOVERY.

4. That part of an order granting a new trial which refuses to change the answers to questions of the special verdict and denies defendant's motion for judgment is not appealable, standing by itself. *Raether v. Filer & Stowell Mfg. Co.* 130
5. A motion to modify a previous order granting a new trial is not a special proceeding, and the order denying such motion is not appealable. *Ibid.*

*Right to review: Persons entitled.* See APPEAL, 28, 29. MUNICIPAL CORPORATIONS, 10.

*Presentation and reservation in lower court of grounds of review: Exceptions.* See APPEAL, 9.

6. Exceptions to the charge of the trial court to the jury should consist of concise paragraphs, pointing out specifically particular detail portions of the instructions, each covering a single matter, as contrary to law and not warranted by the evidence. *Robertson v. Dow,* 605
7. Whenever it appears probable that injustice might otherwise be done to a party on appeal, the court will disregard technicalities and rigid rules of practice and will review the record notwithstanding shortcomings of counsel in presenting the case. *Ibid.*

*Same: Bill of exceptions.*

8. Where there is no new trial in the circuit court upon appeal from the civil court of Milwaukee county, the record on that appeal is before the supreme court on an appeal from the circuit court, without any bill of exceptions. *Lindenmann v. Kopczynski,* 164

9. In the absence of a bill of exceptions embodying specific exceptions to the findings of fact, this court cannot determine that the findings are unwarranted by the evidence or that a new trial should have been granted because of newly discovered evidence; hence a judgment supported by the pleadings and findings must be affirmed. *Statkawicz v. Laguna,* 304

*Limitations: Appeals from orders: Service of copy.*

10. Although strictly, under sec. 3042, Stats., a copy of an order should be served with the notice of entry thereof, the statute is satisfied by service of the copy at one time and the notice of entry at a later date. *Hoefer v. Milwaukee,* 83

*Dismissal of appeal.*

11. If an appeal embracing two or more orders is ineffective as to one of them because taken too late, it will be dismissed as to that one but held effective as to the others. *Hoefer v. Milwaukee,* 83

*Printed case.*

13. The printed case on appeal should contain so much of the evidence as is necessary for the proper consideration of the assignments of error. *Dreblow v. Albert,* 189

*Briefs.*

14. In the brief for appellant counsel should particularly point out and discuss in an orderly way the errors relied upon, and should not, upon a mere reference to the exceptions, ask this court to review the trial court's charge to the jury. *Robertson v. Dow,* 605

*Review: Presumptions.* See APPEAL, 20. MASTER AND SERVANT, 34. RAILROADS, 6.

15. Where the evidence tends to establish several grounds of liability, all growing out of the same transaction, which are submitted to the jury for a general verdict, there is no error in the fact that it is impossible to tell upon which ground the verdict is based; and the presumption after judgment is that all the jurors agreed upon some one or all of the several grounds. *Cooper v. Chicago & N. W. R. Co.* 614

16. If in such case there was no request for a special verdict nor for proper instructions which would have eliminated any alleged ground of liability which was insufficiently supported by evidence, the verdict will be deemed to rest upon those grounds of liability which are supported. *Ibid.*

*Same: Questions considered.* See APPEAL, 7–9. HABEAS CORPUS, 1. PARTNERSHIP, 5. TRIAL, 10.

17. Where a motion for a new trial is made promptly and in ignorance of the fact that judgment has been entered on the

verdict, and the circuit court treats the motion as one made before judgment, and the opposing counsel acquiesce by accepting the advantages of the order made, an exception will be made to the rule that where the motion for a new trial was made after judgment the sufficiency of the evidence to support the verdict will not be considered on appeal from the judgment. *Cooper v. Chicago & N. W. R. Co.* 614

*Same: Findings, when disturbed.* See ABATEMENT AND REVIVAL, 4. CONTRACTS, 26. COURTS, 2. DISCOVERY, 3, 8. PLEDGES.

18. The circuit court's determination on a pure matter of fact will not be disturbed upon appeal unless the record presents manifest error. So *held* in a case where the circuit court, on appeal from the civil court of Milwaukee county, reversed a judgment of nonsuit and ordered a new trial on the ground that the evidence fairly presented a case for a jury. *Bartl v. C. H. Starke D. & D. Co.* 162

19. Where the evidence is conflicting the verdict of a jury, confirmed by the trial court, is conclusive; and when the trial court fairly decides that there is a conflict in the evidence the determination is well nigh as conclusive as a verdict where a conflict of evidence is conceded. *Adlington v. Viroqua,* 472

20. The common evidentiary presumption in favor of judicially found facts does not exist where such findings are the result of misconception of law. *Boardman v. Lorentzen,* 566

*Same: Affirmance and reversal: Material and immaterial errors.* See APPEAL, 9, 15. COURTS, 3. DAMAGES, 1, 9–12. EVIDENCE, 2. HABEAS CORPUS, 2. LIBEL AND SLANDER, 1, 2, 4, 5, 7. LANDLORD AND TENANT, 11. MASTER AND SERVANT, 2, 5–7, 27. MORTGAGES, 2. NEW TRIAL, 1–3. PLEADING, 7. RAILROADS, 5, 10. SCHOOLS AND SCHOOL DISTRICTS, 3. TRIAL, 1, 5, 6. WITNESSES, 5, 6.

21. Where the appeal from one order in the cause is ineffective and such order, being still in force, concludes the subject matter of a later order, such later order should be affirmed although properly appealed from. *Hoefer v. Milwaukee,* 83

22. An order granting a new trial, made in the exercise of the trial court's discretion, will be affirmed unless an abuse of discretion appears. *Raether v. Filer & Stowell Mfg. Co.* 130

23. Where, in an action to recover for services, the jury by a general verdict found that no valid contract to pay for such services was made by or on behalf of defendant, the error, if any, in excluding from the jury's consideration the claim for a certain part of the services which had originally been rendered to another person, but for which plaintiff alleged the defendant agreed to pay, was not prejudicial. *Dalberg v. Jung B. Co.* 185

24. The finding of the jury upon the issue of contributory negligence will not be disturbed upon appeal if there is any credible evidence to support it. *Dolphin v. Peacock M. Co.* 439

25. It is not prejudicial error to refuse a requested instruction which, though good law in the abstract, could not have aided the jury in answering the question to which it was directed. *Ibid.*

26. Slight inaccuracies in the statement of the issues in a case by the court to the jury are immaterial errors and will be disregarded on appeal. *Robertson v. Dow*, 605

*Same: Successive appeals: Law of the case.* See JUDGMENT, 1.

*Determination and disposition of cause: Mandate on affirmance or reversal.* See CONTEMPT, 5.

27. In an action upon a building contract and for extras, where plaintiffs had ample opportunity at the trial to present evidence as to all their claims, and it was stipulated that affirmance on appeal of the judgment entered should end the litigation, the cause will not, upon such affirmance, be sent back for the taking of further evidence. *Burroughs v. Joint School Dist.* 426

*Appeal from county court: "Person aggrieved."*

28. The proponent of a will, who is named as executor therein, is a "person aggrieved" by a judgment of the county court refusing probate to the will, and hence, under sec. 4031, Stats., may appeal from such judgment. *Cowan v. Beans*, 417

29. Such a person, if he in good faith believes that the will has been wrongfully denied probate by the county court, should appeal from the decision. *Ibid.*

*Appeal from town supervisors.* See HIGHWAYS, 2.

APPEALABLE ORDERS. See ABATEMENT AND REVIVAL, 3. APPEAL, 4, 5. CONTEMPT, 1. DISCOVERY, 13.

APPOINTMENT of officers. See MUNICIPAL CORPORATIONS, 4–7.

ASSAULT AND BATTERY. See DAMAGES, 10, 11.

ASSESSMENTS. See MUNICIPAL CORPORATIONS, 16, 17. TAXATION, 4–8.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 9, 30–38. RAILROADS, 3–10.

ATTORNEY AND CLIENT: Privilege. See DISCOVERY, 6.

ATTRACTIVE NUISANCES. See MUNICIPAL CORPORATIONS, 32.

BAILMENT. See CARRIERS. CONVERSION.

BALLOTS. See PUBLIC UTILITIES, 3–5.

BANK STOCK. See TAXATION, 4–7.

BILL OF EXCEPTIONS. See APPEAL, 8, 9.

BILL OF PARTICULARS. See BROKERS, 2.

BONDS. See LIMITATION OF ACTIONS, 1–12. PUBLIC UTILITIES, 2, 15. SCHOOLS AND SCHOOL DISTRICTS, 3–6.

BRIDGES. See MUNICIPAL CORPORATIONS, 24.

BRIEFS. See APPEAL, 14.

BROKERS.

*Commissions.*

1. In an action to recover for services in procuring an option for a lease, alleged to have been rendered under a contract made by an agent on defendant's behalf, testimony of defendant's officers that the agent had never been given express authority to make such contracts was properly admitted. *Dalberg v. Jung B. Co.* 185

2. It being admitted in the complaint that plaintiff had sued another person for a certain part of the services for which this action was brought, the bill of particulars in such other action was of no moment in this action, and was properly excluded when offered in evidence by plaintiff. *Ibid.*

3. Where purchases and sales of grain for future delivery were made through a broker with no intent on the part of the principal to receive or deliver the grain, but with intent merely to gamble on the market price thereof, if the broker had knowledge of that illegal intent he cannot recover from the principal for commissions or advances upon the transactions. *Kassuba C. Co. v. Blodgett,* 529

BUILDING CONTRACTS. See APPEAL, 27. CONTRACTS, 7–12, 23–27.

BURDEN OF PROOF. See DAMAGES, 6. EVIDENCE, 1, 2. FRAUD, 5.

CANCELLATION OF INSTRUMENTS. See VENDOR AND PURCHASER, 1.

CARRIERS.

See DAMAGES, 5–8.

The fact that a storage company is also engaged in the draying business does not make it a common carrier as to that part of its business which consists of storing goods for hire, or entitle it to enforce a lien for storage charges by proceedings under ch. 391, Laws of 1903 (secs. 1646—1 to 1646—3, Stats.); but it must proceed under sec. 3347, Stats. *Schacht v. Oriental S. & T. Co.* 121

CERTIORARI. See TAXATION, 4.

CHANGE OF GRADE. See MUNICIPAL CORPORATIONS, 18–24.

CIRCUIT COURTS. See APPEAL, 1, 3. CONTEMPT, 1. COSTS, 1. COURTS, 1, 2. NEW TRIAL, 5.

CIRCUMSTANTIAL EVIDENCE. See EVIDENCE, 3. FRAUD, 4.

CITIES. See MUNICIPAL CORPORATIONS.

CIVIL COURT OF MILWAUKEE COUNTY. See APPEAL, 1. COSTS, 1. NEW TRIAL, 5.

CLASSIFICATION. See CONSTITUTIONAL LAW, 7–9. PHYSICIANS AND SURGEONS, 2.

COLLATERAL SECURITY. See PLEDGES.

COMITY. See INSURANCE, 5.

COMMERCE.

*Interstate commerce.* See DAMAGES, 6.

In an action for breach of contract for interstate transportation, the rule that Congress has the paramount right to legislate respecting interstate traffic has no application unless the contract was in violation of the federal law. *Altschuler v. Atchison, T. & S. F. R. Co.* 146

COMMISSION FORM OF GOVERNMENT. See CONSTITUTIONAL LAW, 5, 6, 8. MUNICIPAL CORPORATIONS, 1–7.

COMMISSIONERS. See HIGHWAYS, 2, 3.

COMMISSIONS. See BROKERS.

COMMITMENT. See CRIMINAL LAW.

COMMON CARRIERS. See CARRIERS. DAMAGES, 5–8.

COMPARATIVE NEGLIGENCE. See RAILROADS, 1, 2.

COMPETENCY. See MASTER AND SERVANT, 26–28. WITNESSES, 1–3.

COMPLAINT. See LIMITATION OF ACTIONS, 12. MUNICIPAL CORPORATIONS, 16, 19, 20. PLEADING, 1–5.

CONCURRENT JURISDICTION. See COURTS, 1.

CONDITIONAL SALES. See ESTOPPEL, 1.

CONFLICT OF LAWS. See CONTRACTS, 4. INSURANCE, 5.

CONSOLIDATION OF ACTIONS. See ACTION.

CONSPIRACY. See CONTEMPT, 2.

CONSTABLES. See CONVERSION.

## CONSTITUTIONAL LAW.

*Legislative powers.* See MUNICIPAL CORPORATIONS, 7. PUBLIC UTILITIES, 5.

*Judicial powers.* See APPEAL, 2, 3.

*Delegation of administrative, legislative, and judicial powers.* See MUNICIPAL CORPORATIONS, 8, 11.

1. In the exercise of many administrative, local legislative, and *quasi*-judicial functions, the county board acts, by delegated authority, as an administrative unit of the state, by virtue of sec. 22, art. IV, Const.; and sec. 39*j*, Stats., is invalid because it attempts to delegate to the electors administrative powers which by said section of the constitution are required to be delegated, if at all, to the county board. *Meade v. Dane County,* 632

2. As to emergency resolutions, the effect of said sec. 39*j* is to confer upon the electors of the county the legislative power of repeal, and for that reason it is in violation of sec. 22, art. IV, Const., and void. *Ibid.*

3. Said sec. 39*j* grants the power of annulling or repealing ordinances as well as resolutions, and this is a delegation of legislative power and forbidden by the constitution. *Ibid.*

4. So far as said sec. 39*j* grants to the electors the power to review and reverse the otherwise final decisions of the county board acting in a *quasi*-judicial capacity, it is a delegation of judicial power, which is also forbidden by the constitution. *Ibid.*

*Same: Option laws: Classification: Commission form of government.*

5. The provision of ch. 448, Laws of 1909, allowing the electors of a city to determine by vote whether the city should elect to come under the law, is valid. *State ex rel. Bloomer v. Canavan,* 398

6. The further provision by which a city at the end of six years might, by vote of its electors, abandon the commission form of government and go back to its old charter, was evidently not a determining factor with the legislature, and, whether valid or not, does not affect the validity of the remainder of the act. *Ibid.*

7. The fact that cities of the first class are excluded from its operation does not render the act unconstitutional. The existing classification of cities having been approved as valid, the power to legislate for one or more of the classes is quite plenary, although no reason can be advanced why the legislation should be confined to the class or classes included. *Ibid.*

8. The city officers provided for under the commission form of government are not constitutional officers, and a statute which prescribes a certificate of good moral character from a certain number of electors as a qualification for candidacy for such offices, does not offend against the constitution. *Ibid.*

9. The provision of ch. 448, Laws of 1909, excluding saloonkeepers from the office of mayor or councilman, violates no constitutional right, since those officers have to do with the granting of licenses for the sale of liquor, the making of ordinances and regulations relative to the liquor traffic, and the enforcement of state laws in reference thereto—matters which might conflict with the interests of saloonkeepers. *Ibid.*

*Police power.* See HAWKERS AND PEDDLERS, 1. INSURANCE, 3.

*Vested rights.* See INSURANCE, 2–4.

*Classification.* See CONSTITUTIONAL LAW, 7–9. PHYSICIANS AND SURGEONS, 2.

*Privileges and immunities.* See CONTEMPT, 3, 4. DISCOVERY, 7. MUNICIPAL CORPORATIONS, 12.

*Taking private property: Just compensation.* See MUNICIPAL CORPORATIONS, 18–22. PUBLIC UTILITIES, 6, 11.

*Municipal corporations: Limitation on indebtedness.* See PUBLIC UTILITIES, 8, 9.

*Tax levies.* See PUBLIC UTILITIES, 12–14.

CONSTRUCTIVE NOTICE. See MASTER AND SERVANT, 29.

CONSTRUCTIVE TRUSTS. See TRUSTS AND TRUSTEES, 1.

CONTEMPT.

1. An order of the circuit court affirming an order of a court commissioner made upon the examination of a party under sec. 4096, Stats., adjudging the witness in contempt for refusing to answer certain questions, and fixing his punishment therefor, is a final order in a special proceeding and is appealable. *Karel v. Conlan,* 221

2. The proofs to sustain a civil action for conspiracy to publish a libel would also tend to render the defendant liable for a criminal conspiracy under sec. 4568, Stats., and for criminal libel under sec. 4569. *Ibid.*

3. Even if it were the rule that when a witness testified under protest the information elicited could not be used against him in subsequent criminal proceedings, that rule would not furnish the full protection against self-incrimination which the constitution contemplates, and hence would not justify compelling him to answer when he claimed his privilege, since the facts disclosed might be proved against him by other evidence perhaps obtained and obtainable only by reason of the compelled disclosure. *Ibid.*

4. A witness cannot invoke the claim of privilege for the purpose of shielding himself from civil liability; but under the constitution (art. I, sec. 8) construed in the light of the common law and of statutory declarations (sec. 4077, Stats.), in no case, whether civil or criminal, can a witness, in the absence of an immunity statute or its equivalent, be compelled to give an answer that may criminate him. *Ibid.*

5. Upon reversing an order adjudging a witness in contempt for refusing to answer certain questions on the ground that the answers might tend to criminate him, where it appears that the trial court did not exercise its discretion as to what questions should be answered, but merely ruled that no privilege could be claimed in a civil action, the case is remanded for further proceedings, to the end that such discretion may be exercised in the first instance by the trial court. *Ibid.*

6. The opinion of a witness that an answer to a question will tend to criminate him is not conclusive, but he should not be compelled to answer unless it is reasonably clear that the answer, whatever it may be, can have no such effect. *Ibid.*

CONTRACTS.

*Requisites and validity: When made: Preliminary negotiations.* See CONTRACTS, 5. DAMAGES, 6. FRAUDS, STATUTE OF, 2. INSURANCE.

1. Where a contract informal, but complete in its terms, appears to have been made, it will take effect and be binding notwithstanding the fact that the parties anticipate that a more formal contract will afterwards be made embodying the same terms. *Francis H. Leggett & Co. v. West Salem C. Co.* 462

2. But letters and telegrams between the parties will not be construed as a contract when it is plain that they were intended only as preliminary negotiations to be followed by a formal contract containing material provisions not contained in nor to be inferred from the preliminary letters or communications. *Ibid.*

*Same: Place of contract: Presumptions: Conflict of laws: Statute of frauds.*

3. The presumption that the place of performance of a contract is the place of the contract is not a presumption of law but a presumption of fact, rebuttable by clear, but not necessarily direct, evidence to the contrary. *D. Canale & Co. v. Pauly & Pauly C. Co.* 541

4. In this case an oral executory contract for the sale of goods for a price exceeding $50 having been made in another state, to be performed by delivery of the goods in Wisconsin, and such contract being valid under the laws of the other state but invalid under the Wisconsin statute of frauds (sec. 2308, Stats.), it is *held*—the question not having been decided as one of fact by the trial court—that the presumption that the place of performance is the place of the contract is overcome by the presumptions that the parties meant to deal with each other honestly, that they knew the law, and that they intended to make a binding contract. *Ibid.*

5. In such case the fact that the parties contemplated that the oral agreement would afterwards be reduced to writing is unimportant, where they also intended by the oral agreement to make a contract *in præsenti.* *Ibid.*

*Custom and usage.*

6. Where the terms of a contract are fixed and not ambiguous even proof of universal custom cannot change them. *Francis H. Leggett & Co. v. West Salem C. Co.* 462

*Entire contracts.* See FRAUDS, STATUTE OF, 1.

*Same: Substantial performance: Extra work.*

7. A contract to build a definite piece of railroad complete, doing all grading, surfacing, putting in all culverts, cattle passes, and road crossings, and laying the rails, furnishing all materials except rails, ties, fish-plates, angle bars, and spikes, and to have the work completed by a date named, for a specified sum to be paid in instalments upon engineer's estimates less fifteen per cent., is an entire contract, and without at least substantial performance there can be no recovery of an unpaid balance of the contract price. *Whalen v. Eagle L. P. Co.* 26

8. When work to the amount of more than $3,000 remains to be done on a $10,000 contract, there is clearly a failure of substantial performance. *Ibid.*

9. Upon the evidence in this case it is *held* that plaintiff was not prevented from completing his contract to construct a railroad by defendant's failure either to make the stipulated payments or to furnish the required materials. *Ibid.*

10. Proof that men employed by plaintiff refused to work because defendant declined to guarantee their pay does not excuse nonperformance, since defendant was not obliged to do that. *Ibid.*

11. The mere fact that plaintiff had done extra work to the value of $25 did not justify a recovery in an action upon an uncompleted entire contract, where he had already received over $5,000 in cash. The court should in such case apply $25 from the payments already made in discharge of that item. *Ibid.*

12. Although plaintiff failed to complete an entire contract for building a railroad to defendant's manufacturing plant, nevertheless for work done by him at defendant's request in filling and grading around the plant, which was entirely independent of the building of the railroad, he is entitled to recover and to enforce a lien against such plant. *Ibid.*

*Construction and operation.* See GARNISHMENT. INSURANCE, 6. LANDLORD AND TENANT. SCHOOLS AND SCHOOL DISTRICTS, 1. VENDOR AND PURCHASER, 1, 2.

13. To aid in determining the intention of the parties to a contract, when that is doubtful, the contract may be read in the light of the circumstances which surrounded the parties when it was made. *Wallis v. First Nat. Bank,* 306

14. Express enumeration, in contracts embracing mutual conveyances of land or interests therein, of the rights reserved and acquired by the parties raises a fair implication that such

enumeration covers all rights intended to be reserved or acquired. *Ibid.*

15. Under certain agreements embracing mutual conveyances between defendant's grantor and plaintiff's grantors, who then owned adjoining parcels of land, one of such agreements having been made at the time, and the other twenty-three years after, defendant's grantor built a party wall upon, and inclosed in her two-story building, a narrow strip of the parcel belonging to plaintiff's grantors, it is *held* that the only rights which plaintiff's grantors retained (and which he acquired) in that part of said strip not covered by the party wall were an easement to use the stairway in said building, adjoining the party wall, for all purposes of access to and egress from any building which might thereafter be erected on their land, the right to pierce the party wall for that purpose, and the right to have the stairway maintained at all times in good condition and repair. *Ibid.*

16. No new building having been erected on plaintiff's parcel to which such right of access and egress would apply, defendant had the right, in reconstructing its building, to remove the old stairway and replace it with a new and better one, and also to make it one foot lower, it not appearing that such changes would in any way injure plaintiff. *Ibid.*

17. Defendant had the right, also, to remove and replace with better material the facing of the front end of the party wall, if such change would not injure plaintiff, and the right to repair or replace the adjoining front wall of its building, so long as plaintiff was not thereby deprived of the use of the stairway. *Ibid.*

18. Defendant might also increase the height of the party wall twenty-eight inches, the wall being of sufficient strength. *Ibid.*

19. It is *not held* that if defendant should add more stories to its building plaintiff would not have the right to have stairways built over the present one to reach such upper stories, and the right to pierce the party wall to reach such stairways. *Ibid.*

20. The owner of property subject to an easement has the right to make incidental changes in the real estate over which the easement extends, or to make beneficial use of the same, provided there is no substantial impairment of the right granted. *Ibid.*

21. The owner of an undivided half of a party wall and of the land on which it stands has a right to repair the wall when necessary and a right to raise the height of the wall, it being of sufficient strength, without the consent and even against the protest of the other owner, if those things can be done without injury to the latter. *Ibid.*

*Same: "Value."*

22. The term "value" usually means market value, but if such meaning, when applied to a particular contract or conditions growing out of it, leads to results clearly not contemplated by the contract, and it is susceptible of another meaning which harmonizes all the provisions of the contract, such other meaning should be given to it. *Burroughs v. Joint School Dist.* 426

23. In a building contract providing for payment in each month of "a sum equal to ninety per cent. of the value of the work done and material furnished during the preceding month, as assessed by the architects," the word "value" is construed to mean, not market value, but *contract value*, i. e. the proportional value of the work and material, based upon the contract price. *Ibid.*

24. The fact that under such construction of the contract the owners had overpaid the contractors, does not show a practical construction of the contract, where upon discovery of such overpayment further payments were refused. *Ibid.*

25. A practical construction will not be deemed to have been given to a contract by the parties in the absence of knowledge of the facts and circumstances to which that construction relates. *Ibid.*

*Performance or breach: Substantial performance.* See COMMERCE. CONTRACTS, 7–12. DAMAGES, 3–8. FRAUDS, STATUTE OF, 2, 3. NEW TRIAL, 2. TRIAL, 9, 10. VENDOR AND PURCHASER, 3.

26. In an action for the reasonable value of materials furnished and work done in decorating a dwelling house, findings of a referee, confirmed by the trial court, to the effect that, although the work was not first class, yet it was a fairly good job; that the defects therein were due in part at least to conditions over which plaintiff had no control; and that it was reasonably worth a certain sum, are *held* to be supported by the evidence and to sustain a judgment in plaintiff's favor for the value so found. *Manthey v. Stock*, 133 Wis. 107, distinguished. *Manthey v. Manger*, 51

27. For the contractor's breach of a building contract by substitution of inferior flooring in place of that specified, the owner may recover such damages as were caused thereby—under the rule laid down in *Foeller v. Heintz*, 137 Wis. 169, and other cases,—although before discovery of the breach he accepted the completed building and sold the property for as much as he would have received if the inferior flooring had not been used. *Lindenmann v. Kopczynski*, 164

CONTRIBUTORY NEGLIGENCE. See APPEAL, 24. ELECTRICITY. FIRES. HIGHWAYS, 4. MASTER AND SERVANT, 8, 10, 17, 19, 31, 33, 39. RAILROADS, 1–10.

## CONVERSION.

See LANDLORD AND TENANT, 11.

Where goods were left for storage with defendant by a constable who had taken them on a writ of replevin sued out by plaintiff, plaintiff's uncontradicted testimony, given without objection, that she had been awarded the goods in the replevin action and had promptly notified defendant of that fact, was sufficient proof of her ownership to justify a recovery by her for conversion of the goods by defendant. *Schacht v. Oriental S. & T. Co.* 121

## COSTS.

See TAX TITLES, 3.

1. It was not an abuse of discretion, under sec. 2924, Stats., for the circuit court to allow $10 costs of motion when granting a new trial in a case appealed from the civil court of Milwaukee county; but it would be better not to impose costs upon defeated parties in such motions. *Pennsylvania C. & S. Co. v. Schmidt,* 242

2. Double costs under sec. 2951, Stats., are not allowed to respondents in this case, although the parties are held to be concluded by a former judgment of this court. *Schenck v. Sterling E. & C. Co.* 219

COUNTERCLAIM. See PLEADING, 3. PUBLIC UTILITIES, 7.

## COUNTIES.

*County board: Legislative powers: Referendum review.* See CONSTITUTIONAL LAW, 1, 4.

1. The words "ordinance or resolution" in sub. 1, sec. 39*j*, Stats., which provides for a referendum review of acts of the county board of supervisors, cover all exercise of power by the county board which lawfully may be or is exercised in the form of a resolution. *Meade v. Dane County,* 632

2. Oral motions when adopted by the county board become resolutions or orders of that body, and are within said statute. *Ibid.*

3. Emergency resolutions, among which are included those which make appropriations for maintaining the county government or any public institution, although they take effect at once, either in whole or in part according to circumstances, appear to be, equally with other resolutions of the supervisors, subject to the referendum review provided for in said act. *Ibid.*

*Officers.* See LIMITATION OF ACTIONS, 1–12.

COUNTY BOARD. See CONSTITUTIONAL LAW, 1, 4. COUNTIES.

COUNTY COURTS. See APPEAL, 28, 29. COURTS, 1, 2.

COUNTY TREASURER. See LIMITATION OF ACTIONS, 1–12.

COURT COMMISSIONERS. See CONTEMPT, 1.

## COURTS.

*Supreme court.* See APPEAL, 1–27.

*Circuit courts.* See APPEAL, 1, 3. CONTEMPT, 1. COSTS, 1. NEW TRIAL, 5.

*County courts: Concurrent jurisdiction of circuit courts: Discretion.* See APPEAL, 28, 29.

1. The county court has full jurisdiction, in law as well as in equity, in respect to all controversies involved in the settlement of the estates of decedents; and the concurrent jurisdiction of the circuit court should not be exercised unless that court can afford more complete and adequate relief than can be had in the county court. *Wisdom v. Wisdom,* 434

2. A money demand against the estate of a decedent, the amount of which is to be determined by an accounting as between trustee and *cestui que trust*, should ordinarily be litigated in the county court, though circumstances may warrant the circuit court in taking jurisdiction. Whether the circuit court should do so or not is so largely a matter of discretion that its determination will not, in general, be disturbed on appeal. *Ibid.*

3. In an action to charge with such an implied trust real property of which plaintiff's husband died seised, it appearing that the persons to whom the lands were devised and other persons who would be affected by the litigation were not made parties but were parties to the pending proceedings to settle the estate in the county court, and there being no good reason why that court should not deal with all the matters involved, an order sustaining a demurrer to the complaint is affirmed without prejudice to the plaintiff's right to proceed in the county court. *Ibid.*

*Civil court of Milwaukee county.* See APPEAL, 1. COSTS, 1. NEW TRIAL, 5.

CRIMINAL CONSPIRACY. See CONTEMPT, 2.

CRIMINAL LAW AND PRACTICE.

*Nature and elements of crime.* See CONTEMPT, 2. HABEAS CORPUS, 2. PHYSICIANS AND SURGEONS, 1.

*Punishment: When term of imprisonment commences.*

Where, after sentence of imprisonment, a convicted person appealed and no commitment was issued and he was not in fact imprisoned pending such appeal, his term of imprisonment did not begin until he was taken into custody on a commitment thereafter issued. *Arnold v. Schmidt,* 55

CRIMINAL LIBEL. See CONTEMPT, 2.

CROPS. See LANDLORD AND TENANT, 9–11.

CROSS-EXAMINATION. See DISCOVERY, 1.

CUSTOM AND USAGE. See CONTRACTS, 6.

DAMAGES.

*Grounds of damage.* See CONTRACTS, 27. LANDLORD AND TENANT, 8. MUNICIPAL CORPORATIONS, 18–24.

1. Where no direct evidence can be adduced as to a loss of sexual potency resulting from a personal injury, the admission of conjectural evidence on the subject is error. *Adams v. Bucyrus Co.* 70

2. In an action for personal injuries, a reasonable sum for the services of plaintiff's wife in nursing him, not exceeding the amount for which plaintiff could have employed others to do the work, is a proper item of damages. *Ibid.*

*Same: Mitigation.* See DAMAGES, 10.

*Exemplary damages.* See DAMAGES, 10.

*Measure of damages.* See MUNICIPAL CORPORATIONS, 21, 22.

3. As a general rule, in actions for breach of contract a person can only be held responsible for such consequences as may

be reasonably supposed to have been in the contemplation of the parties at the time of making the contract. *Altschuler v. Atchison, T. & S. F. R. Co.* 146

4. But where special circumstances exist, mutually known and contracted with reference to, the parties are presumed to have had in contemplation, as a result of the breach, such damages as may reasonably and fairly be considered as arising naturally, that is, in the usual course of things, from such breach under the special circumstances. *Ibid.*

5. A common carrier contracting with the proprietor of an orchestra for a definite itinerary and to reach a certain city on a certain day at a specified hour in the forenoon, may be held responsible for the loss of receipts for a scheduled afternoon performance, although its agent had no knowledge that such performance was to be given, or the terms under which it was to be given. *Ibid.*

6. The burden of proof is upon a carrier sued for a breach of a contract of transportation to prove the illegality of a contract if such illegality exists under the Interstate Commerce Act. *Ibid.*

7. Where plaintiff, suing for breach of contract for the transportation of his orchestra and their baggage, was to receive a certain percentage of the gross receipts of an afternoon performance which could not be given because of such breach, he was properly allowed to recover such percentage of the total sale of tickets without deduction for possible expenses of which there was no evidence. *Ibid.*

8. The evidence in such case upon which the jury based a finding that plaintiff lost a certain amount by reason of diminished attendance at the evening performance, caused by the delay in delivering the baggage, is *held* to be speculative and conjectural and hence insufficient to sustain such finding. *Ibid.*

*Excessive damages: Nonprejudicial errors: Evidence.*

9. Where in the opinion both of the trial judge and of this court the damages found by the jury were much too large, this court, even when it cannot hold that the refusal to grant a new trial was an abuse of discretion, may reverse the judgment because of errors in the admission and exclusion of evidence bearing upon the amount of damages which might otherwise have been passed as nonprejudicial. *Nelson v. Snoyenbos,* 590

10. In an action for false imprisonment and assault and battery, where there was evidence on behalf of defendant tending to show that he caught the plaintiff stealing tobacco in his store and moderately "spanked" him, although plaintiff denied the theft and testified to a more serious assault, a ruling by which the jury were told that the question of larceny was "absolutely of no importance" in the case was erroneous because, though not a justification, the larceny, if proven, would have an important bearing in mitigation of damages both compensatory and punitory. *Ibid.*

11. So, also, the exclusion of evidence offered to show that about two months after the affair in question plaintiff was found in a store and was taken by the sheriff to the county jail, was

erroneous because such evidence bore directly on the probable degree of shame and humiliation which plaintiff suffered from defendant's conduct, and so affected the amount to be recovered. *Ibid.*

12. Such errors having intervened at the trial, and the damages awarded being much too large in the opinion both of the trial judge and of this court, and there having been, on a motion for a new trial, a showing of newly discovered evidence to disprove the chief element of damage claimed by plaintiff, a new trial should have been granted; and the judgment for plaintiff is accordingly reversed. *Ibid.*

*Same: Amount.*

13. Plaintiff, earning from $90 to $95 per month, was so injured by the fall of a heavy roller upon him that he will never again be able to walk freely, or do heavy lifting or stooping, but will probably be able to walk with a cane and do many kinds of light work. At one time after his injury he had employment in which he earned $45 per month. *Held*, that an award of $18,300 was excessive, and that any award exceeding $12,000 should not be sustained. *Adams v. Bucyrus Co.* 70

14. Where plaintiff, at the time of his injury, was twenty-five years of age and in perfect health, had a wife and one child dependent upon him, and was earning $2.25 per day, and his injuries were of a most serious character, causing much pain and suffering and total and permanent inability to work, an award of $11,000 was not excessive. *Dolphin v. Peacock M. Co.* 439

15. Where a married woman, fifty-five years of age, sustained serious injuries by reason of a fall on an icy sidewalk and, though no bones were broken, suffered much pain, was unable to go outdoors for some months, could not for nearly a year go about as usual, and was likely always to suffer some sense of weakness and infirmity from the injury, an award of $1,500, though large, was not clearly excessive. *Adlington v. Viroqua*, 472

16. In an action by a husband to recover for loss of services and for expenses, etc., caused by an injury to his wife, who was struck by a railway train, an award of $467 (reduced by the trial court from $1,067) is *held* not excessive. *Cooper v. Chicago & N. W. R. Co.* 614

DANGEROUS MACHINERY. See MASTER AND SERVANT, 7–10.

DEATH. See ABATEMENT AND REVIVAL, 1, 2, 5. MASTER AND SERVANT, 7.

DEBT, when incurred. See PUBLIC UTILITIES, 8, 9.

DE FACTO AND DE JURE OFFICERS. See MUNICIPAL CORPORATIONS, 7. OFFICERS, 2. SCHOOLS AND SCHOOL DISTRICTS, 4.

DEFICIENCY JUDGMENT. See MORTGAGES, 3.

DELEGATION OF POWER. See CONSTITUTIONAL LAW. MUNICIPAL CORPORATIONS, 8, 11.

DEMURRER. See CONTRACTS, 3. PLEADING, 4–6, 9, 15.

DEPOSIT. See TAX TITLES, 3.

DEPOSITIONS. See CONTEMPT, 1. DISCOVERY.

DIRECTION OF VERDICT. See MASTER AND SERVANT, 24.

DIRECTORY STATUTES. See TRIAL, 7.

## DISCOVERY.

See CONTEMPT, 1.

1. An examination under sec. 4096, Stats., is in the nature of a cross-examination. The statute has been amended from time to time so as to accomplish full disclosure and should be liberally construed to that end. *Horlick's M. M. Co. v. A. Spiegel Co.* 201

2. The examination of a corporate officer under the statute, after complaint served but before answer, is subject to the same rules as that of any other witness, the only restriction being that he cannot be compelled to disclose anything not relevant to the controversy. *Ibid.*

3. The examination is very largely in the discretion of the trial court, and its order made in proceedings under the statute will not be disturbed on appeal except for clear abuse of such discretion. *Ibid.*

4. In an equitable action to restrain defendant from selling a spurious article as and for a product manufactured by plaintiff corporation, an officer who verified the complaint, in which the making of deceptive sales was averred on information and belief, may properly be required, in an examination under said sec. 4096, to disclose the contents of reports made to him concerning such sales, by employees and agents of the corporation, which formed the basis of the allegations of the complaint. *Ibid.*

5. Reports made by employees and agents of a corporation to a superior officer for the purpose of enabling the corporation to bring or prosecute an action, are not privileged. *Ibid.*

6. The privilege existing between attorney and client is confined strictly within the limits of the statute (sec. 4076, Stats.) and extends only to communications made by the client to his attorney and the advice given thereon by the latter in the course of his professional employment. *Ibid.*

7. In an action for unfair trade, questions asked of a corporate officer who verified the complaint, upon his examination under sec. 4096, as to the names and addresses of persons making reports to the corporation upon which he based his belief of the truth of the complaint, and whether such reports were in writing or by parol, did not call for the disclosure of trade secrets, nor did they constitute an unreasonable search or seizure under secs. 11, 22, art. I, Const. of Wis., or under the Fourth amendment, or sec. 1 of the Fourteenth amendment, to the federal constitution. *Ibid.*

8. Where it is not clear that evidence called for under sec. 4096 is within the knowledge of the party calling for it, the discretion of the trial court in requiring the questions to be answered will not be interfered with. *Ibid.*

9. Where a complaint for unfair trade charges substitution of a spurious article for a food product manufactured by plaintiff, the ingredients of plaintiff's product involve a vital issue in the case, and questions on that subject are therefore relevant and proper. *Ibid.*

10. It was also proper upon such examination to direct the witness to produce certain bottles and their contents from which the alleged substitution was made, which had been in defendant's store but which had been delivered before the action to an agent of the plaintiff. *Ibid.*

11. Under the provision of sec. 4096, Stats., that a party may be required to produce upon his examination "all books, papers, files, records, things, and matters," etc., the production of any article, though of a physical character, which is relevant to the controversy may be compelled. *Ibid.*

12. Although an examination under sec. 4096 is a substitute for the old bill of discovery, the statute goes further than the bill of discovery and an examination under it is not governed nor limited by the rules in chancery. *Ibid.*

13. An order directing that a party need not answer certain questions asked of him on his examination under sec. 4096, Stats., is not appealable. *Ibid.*

DISCRETION. See ABATEMENT AND REVIVAL, 4, 5. ACTION. APPEAL, 22. CONTEMPT, 5. COSTS, 1. COURTS, 2. DAMAGES, 9. DISCOVERY, 3, 8. EQUITY, 8. HIGHWAYS, 3. NEW TRIAL, 1.

DISMISSAL of appeal. See APPEAL, 11.

DIVISIBLE CONTRACTS. See CONTRACTS, 7–12. FRAUDS, STATUTE OF, 1.

DOCUMENTARY EVIDENCE. See CONTRACTS, 2. EVIDENCE, 4. WITNESSES, 3.

EASEMENTS. See CONTRACTS, 15–21.

EJECTMENT.

In an action of ejectment, findings of the trial court to the effect that the lease under which defendant justified had not been abrogated, that defendant had exercised an option to continue the lease in force beyond the original term, and that plaintiff had purchased the premises with notice of the lease, are *held* to be supported by the evidence. *Esser v. Breckheimer B. Co.* 620

ELECTIONS. See CONSTITUTIONAL LAW, 5–9. PUBLIC UTILITIES, 3–5, 9, 10, 15.

ELECTRICITY.

See LANDLORD AND TENANT, 1–6.

Where a broken or detached guy wire, charged with electricity, was hanging near a pole, swaying and emitting flame or sparks when it came in contact with the pole, a city fireman who had been stationed there and told to keep away and keep others away from the pole and wire, because it was dangerous, was, as a matter of law, guilty of contributory negligence when, in an uncalled-for attempt to break down the wire, he grasped it with his bare hand and received a shock which killed him. *Glander v. Milwaukee E. R. & L. Co.* 381

EMINENT DOMAIN. See PUBLIC UTILITIES, 7.

ENTIRE CONTRACTS. See CONTRACTS, 7–12. FRAUDS, STATUTE OF, 1.

## EQUITY.

*Laches.* See INSTRUCTIONS TO JURY.

*Restraining enforcement of judgment: Jurisdiction: Fraud.*

1. An independent action to prevent the enforcement of a judgment because of happenings after its rendition, by a practice so settled as to be regarded jurisdictional, cannot be maintained in the same or any other court, the remedy being confined to proceedings by motion in the original action. *Laun v. Kipp,* 347
2. Equity having properly acquired jurisdiction to restrain the enforcement of a judgment upon the ground of its being unconscionable *ab initio,* it may deal with the subject of whether such judgment should not be enforced because of happenings subsequent to its rendition where the later wrong, perpetrated or threatened, is germane to that characterizing the judgment originally. *Ibid.*
3. As a general rule, any fact which clearly proves it to be against conscience to execute a judgment and of which the injured party might have availed himself in the original action, but was prevented by fraud or accident unmixed with any fault or negligence of himself or his agents, will justify an application to a court of chancery to prevent such execution. *Ibid.*
4. The rule above stated is one of judicial policy applicable to all ordinary situations and not one of limitation of judicial power,—the power itself being as broad as the maxim "There is no wrong without a remedy." *Ibid.*
5. The public policy requiring the general rule to be as stated, does not militate against the power of equity going further in exceptional situations where the ends of justice clearly require it. *Ibid.*
6. No rule can be formulated setting a definite boundary beyond which a court of equity cannot go as matter of power, or will not go under any circumstances, as matter of sound public policy, in preventing the enforcement of an unconscionable judgment. *Ibid.*
7. The fraud which will justify a court of equity in preventing the enforcement of an unconscionable judgment may be intrinsic as well as extrinsic,—the test being, not the nature of the fraud, but the injustice of wrongfully impoverishing one for the enrichment of another. *Ibid.*
8. Though equity may restrain enforcement of a judgment which is unconscionable because of fraud intrinsic as well as fraud extrinsic, whether the court should interfere in such cases being matter of wise administration rather than of power, fraud of the latter kind would call successfully for judicial interference in circumstances where fraud intrinsic would not. *Ibid.*
9. In case of a judicial remedy in equity being invoked to prevent the enforcement of a fraudulent judgment, the rule that facts relied upon for a recovery on the ground of fraud must be established by clear and satisfactory evidence applies and with considerable emphasis. *Ibid.*

ERROR, WRIT OF. See APPEAL, 1–3.
ESTATES in land. See WILLS, 5–9.

ESTOPPEL.

See EVIDENCE, 1. LANDLORD AND TENANT, 10. PUBLIC UTILITIES, 16.

1. A conditional vendor who, having given to the vendee possession and apparent authority to sell the property, either expressly or impliedly consents to such sale by the vendee, will be estopped from asserting his rights to the injury of a purchaser who bought in the ordinary course of business and paid for the property without notice. *Oconto Land Co. v. Wallschlaeger*, 418

2. The mere fact that about one third of the purchase price of lumber was paid by applying thereon a precedent debt of the vendor for advances made to him by the vendee for the purpose of paying for stumpage and secured in part by an executory contract for the sale of the lumber in the following season at the market price, did not render such sale, when consummated, one out of the ordinary course of business. *Ibid.*

3. Knowledge by the purchaser of lumber that the vendor was logging on land which did not belong to him was not notice that the timber so being cut was not paid for or that its sale to said vendor was conditional with title reserved in the owner of the land. *Ibid.*

EVIDENCE.

*Presumptions.* See CONTRACTS, 3, 4. DAMAGES, 4. FRAUD, 3. MASTER AND SERVANT, 5.

*Burden of proof.* See DAMAGES, 6. FRAUD, 5.

1. Where defendant in his answer sets up affirmative matter by way of estoppel, the burden of proof is upon him to establish such defense. *Pennsylvania C. & S. Co. v. Schmidt*, 242

2. An erroneous instruction as to the burden of proof upon a material issue is sufficient cause for reversal where the finding of the jury on that issue is adverse to the party upon whom the burden is erroneously placed. *Ibid.*

*Circumstantial evidence.* See FRAUD, 4.

3. There must be a basis of fact for countervailing hypotheses before they can be brought forward to weaken or destroy the effect of circumstantial evidence. *Cooper v. Chicago & N. W. R. Co.* 614

*Speculative and conjectural evidence.* See DAMAGES, 8. MASTER AND SERVANT, 1, 7.

*Admissions.* See BROKERS, 2. EVIDENCE, 2.

*Documentary evidence.* See CONTRACTS, 2. WITNESSES, 3.

4. An unsigned paper purporting to embody an agreement between certain parties named therein, is admissible in evidence against one of such parties to prove the relations existing between them, when offered in connection with evidentiary admissions by him that it does indicate the actual arrangement subsisting between the persons named. *Robertson v. Dow*, 605

*Weight and sufficiency.* See CONTRACTS, 9, 15, 19, 26. CONVERSION. DAMAGES, 8. EJECTMENT. EQUITY, 9. ESTOPPEL, 3. FIRES, 2, 3. FRAUD, 2, 10. HIGHWAYS, 4. INSURANCE, 6. MALICIOUS PROSECUTION. MASTER AND SERVANT, 1, 3, 4, 7, 9, 10, 14, 24. PRINCIPAL AND AGENT, 2. RAILROADS, 3. VENDOR AND PURCHASER, 1.

EXCEPTIONS. See APPEAL, 6–9.

EXCESSIVE DAMAGES. See DAMAGES, 9–16.

EXECUTORS AND ADMINISTRATORS. See APPEAL, 29.

EXEMPLARY DAMAGES. See DAMAGES, 10.

EXTRA WORK. See CONTRACTS, 11.

FALSE IMPRISONMENT. See DAMAGES, 10, 11.

FEES. See OFFICERS, 4, 5.

FELLOW-SERVANTS. See MASTER AND SERVANT, 18, 25–29, 36. RAILROADS, 3, 9, 10.

FINDINGS OF FACT. See APPEAL, 18–20. CONTRACTS, 26. TRIAL, 7–11.

FIRE AND POLICE COMMISSION. See MUNICIPAL CORPORATIONS, 1–7, 12.

## FIRES.

1. One who knows that his property is exposed to destruction by an existing fire is bound to use all reasonable precautions to prevent its destruction, and if he fails to perform that duty is guilty of contributory negligence precluding a recovery against the person through whose negligence the fire started. *Brunner v. Minneapolis, St. P. & S. S. M. R. Co.* 253

2. A fire which, through defendants' negligence, started on the railroad right of way, destroyed, more than fifty hours later, certain forest products owned by plaintiff which were piled on the opposite side of the track. The jury found that defendants ought reasonably to have anticipated, under all the circumstances, that the fire might probably reach and burn plaintiff's forest products as a natural and probable result. Upon the evidence, stated in the opinion, it is *held* that plaintiff also ought reasonably to have anticipated that the fire might probably reach and burn his property. *Ibid.*

3. Upon the facts established by plaintiff's own evidence, and in view of the existing conditions known to him, it is *held*, contrary to a finding by the jury, that plaintiff did not use that degree of care and caution to prevent the destruction of his property that the law required him to exercise, and hence that he was guilty of contributory negligence precluding a recovery. *Ibid.*

FORECLOSURE. See MORTGAGES. PLEDGES.

FOREIGN JUDGMENTS. See JUDGMENT, 3–6.

FORFEITURE. See INSURANCE, 7, 8.

## FRAUD.

*Undue influence: Degree of proof required: Right to dispose of property as against heirs.* See EQUITY, 7–9. PLEADING, 3–5. TRUSTS AND TRUSTEES, 3.

1. He who obtains property by will or otherwise through undue influence or consciously taking advantage of incompetency of

the owner, commits a fraud of most serious character. *Boardman v. Lorentzen,* 566

2. The common rule as to certainty of the existence of facts constituting fraud, applies, emphatically, in case of the wrong being that of obtaining property by undue influence or taking advantage of incompetency of the owner,—such facts are required to be established by clear and satisfactory evidence. *Ibid.*

3. In a controversy as to whether property was obtained by undue influence, there is an evidentiary presumption in favor of the person charged, the same as in all cases sounding in fraud, that he did not perpetrate the wrong. *Ibid.*

4. The charge of obtaining property by undue influence may be circumstantially, *prima facie*, established; but that requires these essentials: proof of a subject unquestionably susceptible to undue influence and clear and satisfactory evidence of opportunity to exercise such influence, a disposition to exercise such influence, and indication that it was in fact exercised. *Ibid.*

5. Upon a *prima facie* case of undue influence having been circumstantially or otherwise established, there is no shifting of the burden of proof upon the accused more than in any other case where plaintiff's evidence, unexplained or uncontradicted, would entitle him to judgment. *Ibid.*

6. In case of a charge of obtaining property by undue influence, *prima facie* or otherwise established, the defendant must meet such *prima facie* case to such extent, at least, that there is no longer clear and satisfactory proof of the facts constituting the charge of fraud. *Ibid.*

7. A person, however old, so long as he retains appreciation of his possessions and relations to others, may dispose of his property in any lawful way he sees fit, and regardless of whether his children or any one else may be pleased therewith. *Ibid.*

8. The heirs at law of a person have no right to his property, except subject to his pleasure,—he is not bound to consult them or be influenced by their wishes, nor have they any right in the matter except that he be left free to exercise his own will. *Ibid.*

9. A person having acted in the exercise of his right to dispose of his property upon his own judgment, it is not within the judicial function to disturb such disposal or do otherwise with reference thereto than to conserve his intention. *Ibid.*

10. If a person makes a disposition of his property in contemplation of death and survives for a considerable period thereafter in such mental condition as to appreciate what he has done, and gives no sign that such disposition was not his free intelligent act, such circumstances are strongly evidentiary of a disposition free from undue influence or incompetency. *Ibid.*

## FRAUDS, STATUTE OF.

*Oral contracts: Indivisible contract: Performance by one party.* See CONTRACTS, 4, 5. VENDOR AND PURCHASER, 2.

1. An oral contract by which defendant agreed that, if plaintiffs would purchase the interest of their partners in a bus line

for conveying passengers to defendant's sanatorium, he would extend for four years his existing contract with said bus line and would not during said term treat at said sanatorium any person other than those brought thereto by said bus line, and that if anything should occur to interrupt said business during said term he would protect plaintiffs against any loss by reason of the purchase, was an entire contract, not divisible. *Kindervater v. Till,* 585

2. Such oral contract, since it purported to bind defendant for four years, was void under sec. 2307, Stats., as a contract which by its terms was not to be performed within one year from the making thereof. *Ibid.*

3. The fact that plaintiffs agreed to the terms and to the continuance of the existing contract between the bus line and defendant and proceeded to purchase their partners' interest in the bus line, did not constitute full performance on their part of the oral contract in suit or take it out of the statute of frauds. *Ibid.*

*Same: Promise to pay debt of another: Executed contract.*

4. Where plaintiff turned over to defendant certain accounts for collection under an oral agreement that defendant might apply the proceeds upon the debt of a third person to defendant, such agreement was not a promise by plaintiff to answer for the debt of another person, and hence was not required by the statute of frauds (sec. 2307, Stats.) to be in writing. *Johnson v. Bank of Sun Prairie,* 603

5. So far as moneys were collected and applied under such agreement the contract was fully executed and that part of the contract could not be set aside even if the original promise were held to be within the statute. *Ibid.*

GAMING. See BROKERS, 3.

GARNISHMENT.

By an agreement between a bank and S. and R., S. signed R.'s note for $1,500 and placed it with the bank as security; the bank was to honor R.'s check for cattle bought on the following day not exceeding $1,500; R. was to ship the cattle to Chicago, sell them, and deposit the proceeds there to the credit of the bank; and the note was to be used only to indemnify the bank against loss in case the proceeds of such sales did not equal the advances. *Held,* that although for convenience the note was in form discounted and the $1,500 entered on the books of the bank to R.'s credit, his checks thereon could be honored only for the special purpose stated and there was no indebtedness to him which could be garnished by his creditors. *McKenna v. Rickey,* 432

GUARANTY. See INSURANCE, 6.

HABEAS CORPUS.

1. Error in dismissing the appeal of a convicted person is not available on writ of *habeas corpus.* *Arnold v. Schmidt,* 55

2. Upon a criminal complaint charging that defendant unlawfully practiced osteopathy and for a fee or compensation prescribed and applied osteopathic manipulation without having obtained

a license authorizing him so to do, the court had jurisdiction to determine whether the so-called chiropractic manipulation which defendant prescribed and practiced was in fact a branch of osteopathy within the meaning of secs. 1435*b*, 1435*e*, Stats.; and the error, if any, in holding that it was such a branch was not a jurisdictional error available on writ of *habeas corpus*. *Ibid.*

3. Under secs. 3408, 3410, Stats., where a writ of *habeas corpus* is applied for by a person who has been committed or detained by virtue of a final judgment of conviction, the writ should be refused if it appears that such judgment was rendered by a court of competent jurisdiction; and where this does not appear until the hearing the writ should be quashed and the prisoner remanded. *Ibid.*

4. *Habeas corpus* is in its nature a summary proceeding, and it is an abuse of the writ to issue it, remand the accused to the custody of his attorney or permit him to go at large on his own recognizance, and then hold the cause for several months under consideration. *Ibid.*

5. One who, never having applied for a license, is convicted of practicing osteopathy without a license, cannot in a proceeding by *habeas corpus* raise the question of the validity of sec. 1435*b*, Stats., so far as it prescribes qualifications for entering upon the study of osteopathy. *Ibid.*

## HAWKERS AND PEDDLERS.

1. Sec. 1570, Stats., which requires a hawker or peddler to obtain a license for which a fee must be paid, is a valid exercise of the police power. But, since the state may tax occupations, it is immaterial whether the exaction be referable to the police power or to the taxing power. *Dewitt v. State*, 249

2. One who goes about from place to place, selling at retail, from house to house, goods which he carries with him, is a peddler, even though he may have a fixed business domicile and may carry with him only a part of his stock of goods. *Ibid.*

HEIRS. See FRAUD, 7, 8.

## HIGHWAYS.

*Establishment: Place of meeting of supervisors: Appeals: Proceedings on reversal: Mandamus.*

1. The mere fact that town supervisors, for shelter or convenience, met at a house ten or twelve rods from the mathematical point designated in the notice of their meeting to decide upon an application for the laying out of a highway, did not deprive them of jurisdiction, such place being in substantial accord with the notice. *State ex rel. Wills v. Larkin*, 549

2. One who, under sec. 1276, Stats., has appealed to a justice of the peace from the decision of town supervisors in the matter of laying out a highway, may subsequently, under sec. 1281, Stats., appeal to the county judge for the appointment of commissioners to review the determination of the commissioners appointed by the justice. *Ibid.*

3. When the determination of town supervisors refusing to lay out a highway has been finally reversed by commissioners upon appeal, the supervisors have no further discretion in the matter, but must lay out the road; and in *mandamus* proceedings to compel them to lay it out, evidence as to the character of the country through which the road would pass, and as to the wishes of the people, is irrelevant. *Ibid.*

*Defects and obstructions: Injuries to automobile.*

4. A verdict finding plaintiff guilty of contributory negligence is supported by evidence that, while driving an automobile at the rate of twelve miles per hour, he left the main track of a country road, and that the under part of his car struck and was damaged by a stump ten inches high which was in the middle of the traveled sidetrack and, though partially concealed, was visible for a distance of fifty to seventy-five feet. *Olmsted v. Greenfield,* 452

HUSBAND AND WIFE. See DAMAGES, 2, 16. INSURANCE, 1–5. JOINT TENANCY. MORTGAGES, 3. WITNESSES, 3.

IMPEACHMENT. See WITNESSES, 4–6.

IMPRISONMENT. See CRIMINAL LAW.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 14–17.

IMPUTED NEGLIGENCE. See RAILROADS, 9, 10.

INCOME TAX. See TAXATION, 1–3.

INDETERMINATE PERMIT. See PUBLIC UTILITIES, 7, 10.

INJUNCTION. See EQUITY, 2, 3, 8. LANDLORD AND TENANT, 5. MUNICIPAL CORPORATIONS, 15. TRIAL, 8.

## INSTRUCTIONS TO JURY.

*General rules.* See APPEAL, 26. MASTER AND SERVANT, 23. TRIAL, 5, 6.

*Requests for instructions.* See APPEAL, 25. MASTER AND SERVANT, 23.

*Assumption of risk.* See MASTER AND SERVANT, 32, 33. RAILROADS, 5.

*Authority to bring action.* See JUDGMENT, 4.

*Burden of proof.* See EVIDENCE, 2.

*Comparative negligence.* See RAILROADS, 2.

*Contributory negligence.* See MASTER AND SERVANT, 32, 33.

*Laches.*

Where an action was not brought until almost six years after the alleged services were rendered for which recovery was sought, and there was a sharp conflict in the testimony as to whether a cause of action ever existed, it was proper to charge the jury that they might take into consideration the delay in bringing suit. *Dalberg v. Jung B. Co.* 185

*Ordinary care.* See RAILROADS, 8.

*Places to work.* See MASTER AND SERVANT, 23.

*Privilege.* See LIBEL AND SLANDER, 4, 5.

*Unguarded machinery.* See MASTER AND SERVANT, 10.

## INSURANCE.

LIFE.

*Assignment of policy: Husband and wife: Vested rights.*

1. The rule that one who insures his own life for the benefit of another and pays the premiums himself may at any time dispose of the policy or may will it away without consent of the beneficiary, was changed, so far as policies in favor of married women are concerned, by ch. 376, Laws of 1891. *Boehmer v. Kalk,* 156
2. The right of a husband to sell, assign, and dispose of a policy of insurance upon his own life for the benefit of his wife, issued prior to passage of ch. 376, Laws of 1891, and upon which he paid the premiums, was a valuable property right and was fully vested; and in so far as said act of 1891 attempted to deprive him of that right it is invalid. *Ibid.*
3. The public has the right to control and regulate the marriage relation and the property rights of the parties thereto by such reasonable and appropriate regulations as do not unnecessarily interfere with those rights of person and property which both state and federal constitutions were framed to protect; but the interests or welfare of the public do not make necessary any such considerable extension of the police power as would be involved in holding that a vested property right, such as the right of selling, assigning, or willing a policy of insurance, can be taken away from the husband by legislative act. *Ibid.*
4. The vested property right which a husband had in a policy of insurance issued prior to the enactment of ch. 376, Laws of 1891, upon his own life for the benefit of his wife, could not be taken away by that statute. *Northwestern Mut. L. Ins. Co. v. Adams,* 335
5. Where such a policy was a Wisconsin contract, governed as to its validity and effect by the laws of Wisconsin, an assignment thereof executed by the husband while both he and the assignee, though domiciled elsewhere, were temporarily in Minnesota, was not invalid merely because in that state the law is settled (contrary to the Wisconsin rule) that a life insurance policy belongs to the beneficiary alone and cannot be assigned by the assured. The state of Minnesota has not forbidden a person to assign a policy which, under the *lex loci contractus,* is his property. *Ibid.*

*Construction of contract: Tontine policy.*

6. A life insurance policy provided that at the end of twenty years, if it was then in force, the insured might, at his option, "withdraw in cash the entire equity (that is, the net reserve, being $3,607.20, and in addition thereto the accumulated surplus" apportioned by the company to the policy). Delivered with the policy, but not attached to it, was a statement purporting to "illustrate" the contract but containing no words of promise or guaranty. This statement showed a cash value of $8,160 at the end of twenty years, but the figures used therein were expressly said to be "based on the results realized on tontine policies which have matured during the current year in this company." Treating such statement as a part of the contract

of insurance, it is *held* that it did not change the policy so as make it guarantee or promise a cash value of $8,160 at maturity. *Timlin v. Equitable L. Assur. Soc.* 141 Wis. 276, distinguished. *Tourtellotte v. New York L. Ins. Co.* 455

*Forfeiture: Waiver of strict performance: Reinstatement, when necessary.*

7. Where, during the last two and one-half years before the death of the insured, all the quarterly premiums on a life insurance policy except the last one were paid by the insured and received by the company, without penalty, at times ranging from 75 to 118 days after they were due, and such course of dealing had induced the insured to believe that strict performance of the terms of the policy had been waived and that payment of defaulted premiums would be received within a reasonable time after default on the understanding that the contract had not lapsed, the failure to pay the last premium, which fell due 33 days before his death, did not result in a forfeiture or lapse of the policy, since the company must be held, under such circumstances, to have waived the provision in the policy for strict performance as to payment of premiums when due and forfeiture for nonpayment. *Fugina v. Northwestern Nat. L. Ins. Co.* 480

8. There having been no forfeiture in such case, no reinstatement of the insured as provided in the policy was necessary. *Ibid.*

INTEREST. See PUBLIC UTILITIES, 11.

INTERSTATE COMMERCE. See COMMERCE. DAMAGES, 6.

INTOXICATING LIQUORS.

*Revocation of license.* See CONSTITUTIONAL LAW, 9.

1. In proceedings before a city council to revoke a liquor license, defects or imperfections in mere matters of form, at any stage of the proceedings, having no tendency to prejudice the defendant are to be disregarded; and where the person and the case may rightly be understood by the tribunal, amendments may be ordered curing such defects. *State ex rel. Wilczewski v. Common Council,* 388

2. The hearing in such a proceeding may be had before the council sitting in committee of the whole, the final action being taken by the council in regular session. *Ibid.*

3. The evidence taken in such a proceeding need not be made matter of record, it being sufficient that the resolution embodying the action of the council recites that evidence was taken and proof submitted. *Ibid.*

JOINT TENANCY.

1. Where real property was conveyed to husband and wife as a part of the wife's share of her mother's estate, by a brother who had held it in trust for the mother during her lifetime, the title vested in such grantees as joint tenants, in the absence of fraud or mistake, and the wife having died before the husband he took the whole as survivor. *Friedrich v. Huth,* 196

2. In such case no resulting trust was created in favor of the wife or her heirs by reason of her having paid the consideration, such trusts having been abolished by secs. 2071, 2077, Stats. *Ibid.*

3. No rights of creditors being involved, and the wife having had full knowledge of the form of the conveyance at the time it was executed and having made no objection thereto, no trust would result in such case by virtue of either sec. 2078 or sec. 2079, Stats. *Ibid.*

4. The rule that where a husband acquires possession of the separate property of his wife he is deemed to hold it in trust for her in the absence of evidence that she intended to make a gift of it to him, has a very general application as regards personal property, but trusts in real estate are covered by the statute. *Ibid.*

5. Where land for which a married woman furnished the consideration was with her consent conveyed to herself and her husband jointly, and upon her death he succeeded to the entire title, he was not entitled to credit for repairs and improvements made on the land, as against his liability to account for personal property held by him in trust for her. *Ibid.*

JUDGMENT.

*Offer of judgment.* See PLEADING, 8.

*On trial of issues.* See PARTITION, 2. PARTNERSHIP, 4.

*For deficiency.* See MORTGAGES, 3.

*Entry of judgment: Oral decision.* See TRIAL, 7, 8.

*Res judicata.*

1. The judgment of this court upon appeal in a former action between the same parties, wherein the same questions were litigated and determined, is conclusive upon the parties in this action. *Schenck v. Sterling E. & C. Co.* 219

2. One who is a party to an action by his authority, given beforehand or by subsequent ratification, is bound by the result. *Robertson v. Dow,* 605

*Enforcement: Injunction against.* See EQUITY.

*Same: Action on foreign judgment.*

3. In an action upon the judgment of a court of another state, an answer that the action in which such judgment was rendered was brought in defendant's name without authority is purely defensive and a reply is not required. *Robertson v. Dow,* 605

4. There being evidence tending to show that a person who caused an action to be brought in defendant's name was either his agent or his partner in the business to which such action was related, instructions submitting to the jury the questions whether such person had express authority "as agent or in any other capacity," and whether he was a partner and as such had the right to bring the action without express authority, were proper, where the court also instructed as to the essential facts of a partnership and left it to the jury to determine whether or not such facts existed. *Ibid.*

5. Persons not parties to the action and from, through, or under whom plaintiff does not in any way derive his interest or title, are not incompetent under sec. 4070, Stats., to testify as to conversations and transactions which they had with a deceased partner of defendant, in an action brought against him as surviving partner. *Ibid.*

6. In an action to enforce a judgment rendered against defendant in an action of replevin instituted in his name in another state by direction of an alleged agent, questions put to the defendant by his counsel as to whether he ever made claim to any property in the possession of the defendant in replevin or ever authorized that action, were properly ruled out as calling for mere conclusions of the witness. *Ibid.*

JUDICIAL POWERS. See APPEAL, 2, 3. CONSTITUTIONAL LAW, 4. EQUITY, 4, 6.

JUNK SHOPS. See MUNICIPAL CORPORATIONS, 9, 11.

JURISDICTION. See APPEAL, 1–3. COURTS, 1, 2. EQUITY, 1, 2. HABEAS CORPUS, 2, 3. HIGHWAYS, 1.

JURY. See NEW TRIAL, 3.

JUSTIFICATION. See DAMAGES, 10.

LACHES. See INSTRUCTIONS TO JURY.

LAND CONTRACTS. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

*Lease: Construction: "Alterations:" Electric wiring: Waste.*

1. A contract appended to a lease, whereby the lessor agreed to furnish to the lessee electric current for incandescent or arc lamps at certain rates during the term of the lease, "provided, however, that the total price paid . . . shall not be less than $200 during any one year," did not require the lessee to take electric current from the lessor for heating or power purposes. *Cawker v. Trimmel,* 108

2. A covenant on the part of a lessee to make no "alterations" in the demised premises has reference, as applied to a building, to changes therein of a substantial nature, and is not breached by the making of small apertures in the wall and floor to admit electric wires. *Ibid.*

3. The making of small apertures for the admission of electric wires, no appreciable damage resulting therefrom, did not constitute waste at common law as between landlord and tenant. *Ibid.*

4. If it could be shown that damage would result from such act, the landlord would have a remedy, regardless of the fact that the premises would not be altered. *Ibid.*

5. *It may be* that under a clause prohibiting alterations a change which was in fact an alteration might be enjoined even though it resulted in no damage to the landlord. *Ibid.*

6. If a provision in a lease to the effect that "if tenants desire telegraphic or telephonic connections, the lessors reserve the right to direct the electricians as to where and how the wires

are to be introduced, and without such directions no boring or cutting for wires will be permitted," applies to electric wires other than telephone or telegraph wires, then the clear implication is that the tenant has the right to install them, but under the direction of the lessors. *Ibid.*

*Same: Negligence: Bursting of water pipes: Liability of lessor.*

7. Plaintiff rented from defendant the first floor and part of the basement of a three-story building under a lease which, in the printed part thereof, required him "to take and use all necessary precautions to prevent damages to any of the water pipes and water works upon said premises, or to any part of said demised premises, by frost or otherwise, and to pay all damages done to said premises by reason of bursting of water pipes, and to turn and let the water out of the pipes in said premises whenever it shall be necessary to do so, to prevent it from freezing or injuring said pipes and property." When the lease was made the second and third floors of the building were occupied as flats by other tenants, each of whom did his own heating. There was but one turn-off for the water, which was located in the basement, accessible to both plaintiff and defendant. Turning off the water there cut off the supply from all the tenants. *Held*, that the quoted provision was intended to make the lessee responsible only for the pipes in the portion of the premises leased by him; that the words "said premises" refer to the premises leased and not to the whole building in which they were situated. *Moroder v. Fox*, 503

8. The flat on the second floor afterwards became vacant and so remained for some time, in the possession of the defendant, who knew that it was not heated and that the water pipes running through it were unprotected. *Held*, that he was negligent in permitting the premises so to remain during the winter time, and became liable to plaintiff for damage to the goods of the latter on the first floor proximately caused by the freezing of the water and bursting of the pipes on the second floor. *Ibid.*

*Same: Title to crops: Stipulation in lease: Validity: Conversion.*

9. A stipulation in a lease that title to the crops raised during each year on the leased premises shall vest in the lessor until such time as the rent shall have been paid, is valid. *Layng v. Stout*, 553

10. The owner of personal property in possession of another may, by permitting the possessor to deal with it as his own, estop himself from asserting title against a *bona fide* purchaser; but that rule has no application where, although a lessee had for several years been permitted to sell crops, receive the proceeds, and pay the rent therefrom, yet on the occasion in question, before the purchase was made, the purchaser had been advised of the lessor's claim of title and forbidden to purchase except upon condition that enough of the proceeds of the sale to cover the rent due be paid directly to the lessor. *Ibid.*

11. In an action for the conversion of grain which, though belonging to plaintiff as the lessor of land, had been sold by her lessee, where it appeared that one of the defendants, with no-

tice of plaintiff's rights, received and accepted from the purchaser of the grain, to apply upon an indebtedness of said lessee, a part of the proceeds of the sale which belonged and should have been paid to the plaintiff, a judgment against said defendant for the amount so received is affirmed upon appeal, although said defendant did not in fact convert the grain. *Ibid.*

LARCENY. See DAMAGES, 10.

LAW OF THE CASE. See JUDGMENT, 1.

LEASEHOLDS. See TAXATION, 8.

LEGISLATIVE POWERS. See CONSTITUTIONAL LAW. MUNICIPAL CORPORATIONS, 7. PUBLIC UTILITIES, 5.

LETTERS. See CONTRACTS, 2. WITNESSES, 3.

LIBEL AND SLANDER.

*Slander: Competency of party as witness: Credibility.*

1. In an action for slander, where the complaint charged that defendant stated to one L. and his wife and son that plaintiff had set fire to and burned a certain cheese factory, and where plaintiff, on his direct examination as a witness in his own behalf, had testified that he had made no threats directly or indirectly with respect to burning the factory, it was proper to permit a witness for defendant to testify that two or three weeks before the factory burned plaintiff had suggested that they ought to burn the factory and that he knew of a party whom they could get to do it. *Cook v. Gust,* 594

2. Plaintiff having denied on cross-examination that he had said to one S. that he was going to run defendant out of town, it was not error to allow S. to testify that defendant had made such statement. Being a witness in his own behalf, plaintiff's animus or bias toward defendant was not a collateral fact, but one which may ordinarily be shown as to any witness, as affecting his credibility. *Ibid.*

*Same: Privilege: Evidence: Instructions to jury.* See CONTEMPT, 3–6.

3. Where, at the time in question, L. was considering an invitation to join a corporation which defendant and others were forming (and from which they planned to exclude the plaintiff) to build a new factory in place of the one which was burned, the alleged slanderous statement, if made by defendant in good faith and without malice in explaining to L. the reasons why he believed plaintiff should be left out, was privileged so far as made to L. himself, and was privileged also as to the wife and son of L. if they had a common interest with him in the disclosure by reason of the fact that it was customary for farmers so situated to consult with their families in regard to such business transactions. *Cook v. Gust,* 594

4. Although an instruction that the jury might find the statement privileged as to the wife and son of L. if their presence "could not have been avoided," should not have been given because there was no evidence warranting it and it was obvious that their presence could have been avoided, yet, since that fact

must have been apparent to the jury, the error in giving such instruction was not prejudicial, there being other legitimate grounds upon which the verdict for defendant might be based. *Ibid.*

5. A further instruction that the jury might find the statement privileged as to the wife and son of L. if they were present in the usual course of the business affairs in which they were then engaged, was not erroneous, since in effect it merely permitted the jury to decide whether or not it was a matter of common knowledge that farmers counsel and advise with their families in reference to business transactions of that nature. *Ibid.*

6. In considering and testing the credibility of the evidence bearing on the question of privilege, the jurors had the right to take into account matters within their common knowledge. *Ibid.*

*Same: Trial: Questions submitted to jury.*

7. In an action for slander where, although the witnesses differed as to the exact language used by defendant, his words could not have been understood as meaning anything else than, as stated in the complaint, that plaintiff was running a house of ill-fame, there was no error in submitting to the jury the question of damages only. *Culver v. Marx*, 453

LICENSES. See HABEAS CORPUS, 5. HAWKERS AND PEDDLERS, 1. INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS, 8–11. PHYSICIANS AND SURGEONS. TAX TITLES, 1, 2.

LIENS. See CARRIERS. CONTRACTS, 12. TRIAL, 9.

LIFE INSURANCE. See INSURANCE.

## LIMITATION OF ACTIONS.

*Computation of period of limitation: Accrual of right of action or defense.*

1. An instrument in the form of a bond which was executed by a county treasurer and sureties under a statute in terms requiring a bond, and which expressly states upon its face that it is sealed with the seals of the signers, must be considered a sealed instrument, although there is no scroll or other indication of a seal after the signatures. *Oconto County v. MacAllister*, 286

2. The time within which an action must be commenced on the bond of a county treasurer was fixed by sec. 4220, R. S. (1878), at twenty years; and by virtue of sec. 4976, R. S. (1878) and Stats. (1898 and 1911), the same limitation continued to be applicable to a cause of action which accrued prior to the enactment of ch. 268, Laws of 1893, unless at the time of such enactment the county had had for three years notice and knowledge that there was a default in the conditions of the bond and that it was entitled to recover thereunder, in which case the time was shortened to ninety days. *Ibid.*

3. Ch. 268, Laws of 1893, provided for such actions a limitation of three years after the county had notice and knowledge as stated, but, there being no provision to the contrary, the twenty-year limitation of sec. 4220 continued by virtue of sec.

4976 to be applicable to causes of action accruing after the enactment of said ch. 268 and prior to the revision of 1898, where the county did not have such notice and knowledge. *Ibid.*

4. By the revision of 1898, ch. 268, Laws of 1893, became sec. 984 of the Statutes, and was amended by dropping the words "notice and" therefrom, so as to require "knowledge" only, and at the same time sec. 4220 was changed so as to expressly except from it the official bonds mentioned in said sec. 984, thereby leaving the limitation prescribed in that section the only one in force applicable to causes of action thereafter accruing upon such bonds. *Ibid.*

5. Knowledge is more than notice, and may or may not flow from notice; and knowledge of a municipal corporation is quite distinguishable from knowledge on the part of a natural person or a business corporation. *Ibid.*

6. A county is not chargeable with "knowledge" (within the meaning of ch. 268, Laws of 1893, or sec. 984, Stats.) of everything that an inspection of the books and records in the treasurer's office would disclose. *Ibid.*

7. Especially would it not be chargeable with knowledge of the contents of duplicate receipts for taxes collected, which were never countersigned as required by law nor filed with the county clerk, as also required, but were retained by the county treasurer in his own files where they had no legal right to be. *Ibid.*

8. Knowledge of the failure of the treasurer to have such duplicate receipts countersigned and to file them with the clerk does not necessarily include knowledge that the county "was damaged because thereof," within the meaning of sec. 984. Stats. *Ibid.*

9. A county is not chargeable with knowledge of collections made by the treasurer of delinquent taxes before sale, from the mere fact that he indorsed the same upon the delinquent tax return kept in his office, the statute not requiring such indorsement, but a different record in another office and in a different form. *Ibid.*

10. If fraud and false entries are resorted to by a county treasurer for the purpose of concealing a default, and he thereby does successfully conceal it from the county officers charged with the duty of investigating, without negligence on their part, the county is not chargeable, as matter of law, with knowledge of the default, even though it might have been discovered by expert examination. *Ibid.*

11. But if such officers might from the lawful records, by a cursory investigation, have discovered the default, or if the lawful records on their face plainly show the default, or if actual knowledge is brought home to the officers charged with the duty of examination and accounting, at the time of such examination and accounting—in all cases excluding the delinquent officer,—the county would have knowledge within the meaning of the statute. *Ibid.*

12. Lack of knowledge, under the statute, is sufficiently averred in a complaint upon a county treasurer's bond which alleges false

entries by the treasurer in his books and false reports of moneys collected by him, made for the purpose of concealing and which did in fact conceal from the plaintiff and its county board the withholding of funds by him, and that neither the county nor its board of supervisors had, prior to a certain date, notice or knowledge of any default in the condition of the treasurer's bond or that the county was entitled to recover thereon. *Ibid.*

*Payments tolling the statute.*

13. Where the interest coupons upon bonds pledged as security for a loan were regularly sent to the borrower at his request, and he collected the same and sent his personal checks to the lender for the amounts so collected, the borrower thereby made payments upon his debt which interrupted the running of the statute of limitations. *Carlson v. Dixon,* 63

MACHINERY. See MASTER AND SERVANT, 7–10. TRIAL, 1.

## MALICIOUS PROSECUTION.

In an action for false and malicious arrest without legal process and for malicious prosecution, evidence showing, among other things, that plaintiff, a milk dealer, not recognizing defendant as a milk inspector, refused at first to give him a bottle of milk, but upon being convinced of his official character offered to let him take the milk; that thereafter defendant arrested him without a warrant for such first refusal; and that, although the subsequent issue of a warrant was advised by an assistant city attorney, defendant did not fully and fairly state the case to such attorney, was sufficient to warrant a verdict and judgment for plaintiff. *Dreblow v. Albert,* 189

MANDAMUS. See HIGHWAYS, 3.

MANDATE. See APPEAL, 27. CONTEMPT, 5.

MANDATORY STATUTES. See TRIAL, 7.

MARKET VALUE. See WITNESSES, 2.

MARRIED WOMEN. See DAMAGES, 2. INSURANCE, 1–5. JOINT TENANCY. MORTGAGES, 3. WITNESSES, 3.

## MASTER AND SERVANT.

*The relation: Compensation.* See TRIAL, 3.

*Master's liability for injuries to servant: Res ipsa loquitur.*

1. In an action to recover for personal injuries caused by the fall of a steel roller forty-two inches in diameter, with a fifteen-inch face, and weighing two tons, which had been left standing upright upon such face on a sand floor, the doctrine of *res ipsa loquitur* is *held* not to apply. *Adams v. Bucyrus Co.* 70

2. Where plaintiff introduced evidence to support the theory that the fall of the roller was caused by vibrations of the earth resulting from the operation of a heavy drop for breaking castings, located about one hundred feet away, it was error to exclude evidence offered by defendant of experiments made with such drop and the fact that a pair of delicate scales attached to a brick wall about fifty feet away were not affected thereby. *Ibid.*

*Same: Line of duty.*

3. Where a helper was employed to carry planks to carpenters who were laying them upon a roof, but failed to supply such planks rapidly enough, and one of the carpenters in going for planks himself was injured by falling from an unsafe runway, the jury was warranted in finding that he was engaged in the line of his duty when injured. *Rosholt v. Worden-Allen Co.* 168

*Same: Dangerous method of doing work.* See MASTER AND SERVANT, 22.

4. Plaintiff, a bricklayer not in defendant's employ, while working upon the first floor of the east wing of a building was struck and injured by a heated bolt or rivet. Between the wall at which he was working and the west wing of the building was a court about thirty feet wide. On the seventh story of the west wing defendant's employees were riveting the steel framework. No one else was engaged in that work around the building. The evidence—which showed among other things that the rivets, after being heated to a white heat, were tossed sometimes a distance of seventy-five or eighty feet to a helper who caught them in a pail or bucket, but missed about one in a hundred—is *held* to sustain findings by the jury that defendant ought reasonably to have anticipated that injury might happen from the manner in which the work was done; that it was defendant's duty to warn plaintiff of his danger; and that failure to warn was the proximate cause of the injury. *Lewandowski v. McClintic-Marshall C. Co.* 322

5. The inference being irresistible that the rivet which struck plaintiff was one heated by defendant's employees, it was not error to refuse to submit that question to the jury. *Ibid.*

6. Although the complaint did not set up failure to warn as a ground of negligence, yet the defendant, not having objected to the submission of that question to the jury, cannot on appeal successfully assert that such submission was error. *Ibid.*

*Same: Unguarded machinery.* See TRIAL, 1.

7. In an action for death of an employee whose duty it was to grease the cables which operated the machinery in defendant's plant and whose body was found suspended from angle irons or girders in the shaft of a heavy counterweight which was a part of the apparatus used in the plant for handling coal, a judgment of nonsuit is *held* to have been proper, there being no evidence sufficient to warrant a finding that any negligence of defendant contributed to the injury or death of the deceased, and the whole question as to how he came in contact with the counterweight being matter of conjecture. [Whether the apparatus in question was a "gearing," a "hoist," or an "elevator," which the statute (sec. 1636*j*, Stats.) required to be guarded, is immaterial and is not considered.] *Hansen v. Milwaukee Coke & Gas Co.* 235

8. Ch. 396, Laws of 1911, amending sec. 1636*jj*, Stats., so as to make the duty of an employer to guard dangerous machinery an absolute one, did not abolish the defense of contributory negligence. *Hilsenhoff v. Fass,* 628

9. In an action for injuries to an employee whose fingers were cut off by unguarded revolving knives of a jointer machine

which he was operating, a finding by the jury that want of ordinary care on the part of plaintiff proximately contributed to cause the injury is *held* not to have been merely a finding of assumption of risk. *Ibid.*

10. In the light of the evidence—showing that before the injury plaintiff removed from the machine a guard which had been provided by defendants, and that the exposure of a large portion of the knives was caused by the manner in which he operated the machine—the charge to the jury, taken as a whole, is *held* not to have been misleading, but to have made it plain that plaintiff could be found guilty of contributory negligence only in case he was so negligently operating the machine as to contribute to his injury. *Ibid.*

*Same: Unsafe working place.* See MASTER AND SERVANT, 30–38. TRIAL, 5, 6.

11. In an action for personal injuries sustained by an employee in a beet sugar factory who slipped upon wet beet pulp on the floor of a well-lighted room through which the pulp was carried by a conveyor, it is *held* that a nonsuit was properly granted on the ground that the evidence failed to show that the place was not, within the requirement of the Workmen's Compensation Act (sec. 2394—48, Stats., as limited by the definition of the term "safe" in sub. 11, sec. 2394—41), as free from danger as the nature of the employment would reasonably permit. *Tallman v. Chippewa S. Co.* 36

[12. To what extent, if any, the statute modifies the common-law duty of the master to exercise ordinary care in furnishing a safe working place, not determined.] *Ibid.*

13. Where a temporary runway upon the nearly flat roof of a building, intended for use in carrying planks to carpenters engaged in laying them on the roof, was twelve feet wide and constructed of planks six inches wide laid loosely upon the roof joists, the master would not be liable at common law to an employee who stepped upon the end of a plank projecting beyond one of the joists and fell to the basement, because (1) a court or jury would not be warranted in finding the place was not reasonably safe and (2) the rule requiring the place of employment to be reasonably safe has no application to building operations where conditions are constantly changing and the dangers arise from acts of the servants themselves in carrying on such operations. *Rosholt v. Worden-Allen Co.* 168

14. But a finding by the jury that such runway was not as free from danger as the nature of the employment would reasonably permit, is *held* in this case to be sustained by the evidence. *Ibid.*

15. Ch. 485, Laws of 1911 (secs. 2394—41 to 2394—71, Stats. 1911), which requires every employer to furnish a place of employment which (excepting places where persons are employed in private domestic service or agricultural pursuits which do not involve the use of mechanical power) shall be as free from danger as "the nature of the employment will reasonably permit," effected a radical change from the common-law rule which required only that the place should be reasonably safe. *Ibid.*

16. Under said statute, as to places which from their nature cannot be made safe, or which cannot be made safe without seriously interfering with the work, the employer is required to make them only as free from danger as the nature of the employment will reasonably permit; but (subject to the exception of certain places as above noted) where the conditions are such as will reasonably permit a place to be made safe, it must be made so, regardless of the character of the employment. *Ibid.*

17. The duty imposed upon the employer by said statute is an absolute one, and for an injury to an employee caused by its nonperformance liability of the employer follows as a matter of course, in the absence of contributory negligence. *Ibid.*

18. Where two employees, without the knowledge or consent of the employer and without any necessity therefor so far as the duties of either are concerned, of their own motion proceed to assemble and use an appliance which proves to be dangerous and inflicts an injury upon one of them, the employer is not liable for such injury on the ground that he has not performed his duty of furnishing a safe working place. *Priebe v. Hirsch*, 181

19. In an action by a miner to recover for injuries caused by the fall of a large rock from the wall at which, by direction of defendant's ground boss, he was working as assistant to a driller, it is *held*, upon the evidence, that plaintiff was under no obligation to test or inspect the wall himself, but had a right to rely upon the inspection made by the ground boss and shovelers unless the danger was open and obvious to him, and that the question of his contributory negligence was one for the jury. *Dolphin v. Peacock M. Co.* 439

20. In such case, the fact that the stone fell very soon after plaintiff began working at the wall was persuasive evidence that it was loose and dangerous, and this, coupled with evidence tending to prove that the ground boss discovered such condition of the wall some days before and sent plaintiff there to work without warning him of the danger, was sufficient to sustain a finding of negligence on the part of the defendant mining company. *Ibid.*

21. Testimony of the ground boss that when plaintiff went to work at the place of injury the rock was loose and dangerous to his knowledge, being corroborated by many facts and circumstances in the record, cannot be held incredible on appeal merely because he had made statements out of court which were not in harmony with such testimony. Such statements went only to his credibility, which was a question for the jury. *Ibid.*

22. The dangerous condition existing at the place where plaintiff was set at work, to the knowledge of defendant and unknown to plaintiff, proof that defendant adopted the usual and customary methods of doing the work did not relieve it of liability. *Ibid.*

23. The doctrine that a master is not liable for failure to provide a safe place to work where the employees themselves are engaged in preparing the working place which is constantly changing as they proceed with their work, has no applica-

tion to the case here presented; and an instruction embodying such doctrine was properly refused. *Ibid.*

24. In an action for death of a boy seventeen years old who was struck by the top of a tree which broke off when another tree which he had just cut down fell against it, it is *held* that a verdict for defendant was properly directed, it being evident that the place was as free from danger as the nature of the employment would reasonably permit, that defendant exercised ordinary care in sending the deceased to cut the tree, and that the accident was so extraordinary that it could not be said that defendant ought to have anticipated it and to have warned the deceased of the danger. *Drella v. Connor L. & L. Co.* 489

*Rules.* See MASTER AND SERVANT, 29.

*Warning and instructing servant.* See MASTER AND SERVANT, 4, 6, 24.

*Incompetency of fellow-servant.* See MASTER AND SERVANT, 18, 36. RAILROADS, 3, 9, 10.

25. The word "habitual" is ordinarily applied to those things which we do customarily or from force of habit. *Moering v. Falk Co.* 192

26. A servant may be incompetent because of carelessness, although not *habitually* careless. *Ibid.*

27. In an action for personal injuries alleged to have been caused by incompetency of a fellow-servant, the evidence showed that the fellow-servant was either habitually careless or was guilty of an occasional fugitive act. of carelessness which, in this case, would not show incompetency. The court submitted for special verdict the question whether he was "an incompetent employee of defendant because of any habitual carelessness" in doing his work, and attention was not at any stage of the proceedings below specifically called to such use of the word "habitual." *Held*, that its inclusion in the question was not improper or prejudicial to plaintiff. *Ibid.*

28. A servant cannot be held incompetent merely because he does what all of his numerous fellow-servants do who are engaged in the same work. So *held*, where the act resulting in plaintiff's injury was the sprinkling of gasoline upon burning gasoline in the process of drying the molds in a foundry. *Ibid.*

29. Where there was a shop rule prohibiting the doing of the act which resulted in plaintiff's injury, and the employees had been repeatedly warned not to do their work in that way and sharply reprimanded for disobeying the rule, and it appeared that they were careful not to violate the rule when any of defendant's officers or agents or vice-principals were around, evidence of a few fugitive violations by one employee during a long period of time did not warrant a finding that defendant had, by reason thereof, constructive notice of the incompetency of such employee. *Ibid.*

*Assumption of risk.* See MASTER AND SERVANT, 9. RAILROADS, 3–10.

30. The inconsistency of findings that in the exercise of ordinary care defendant ought to have known, but plaintiff ought not to have known, that plaintiff's working place was unsafe, is immaterial where, under sub. 1, sec. 2394—1, Stats., the de-

fense of assumption of risk is not open to defendant. *Rosholt v. Worden-Allen Co.* 168

31. Assumption of risk and absence of contributory negligence may co-exist. *Murray v. Paine L. Co.* 409

32. An affirmative answer to a question, "Did the plaintiff voluntarily use the platform in its changed condition?" after a finding that he took part in making the change in question, did not in terms constitute a finding upon the issue of plaintiff's assumption of the risk; but where the court in connection with such question instructed the jury that a servant voluntarily using a dangerous structure or machine with knowledge of its condition assumes the risk, it would, if standing alone upon that issue, constitute such a finding. *Ibid.*

33. Where, however, the court by its instructions in connection with a question upon the issue of contributory negligence, submitted under that question the issue of whether or not plaintiff assumed the risk, and the jury returned a negative answer, such answers were conflicting and would warrant judgment for neither party. *Ibid.*

34. Defendant having requested the submission of a question clearly presenting the issue of assumption of risk, which was refused, no finding upon that issue in defendant's favor can be presumed under sec. 2858*m*, Stats., unless it can be held as a matter of law that plaintiff did assume the risk. *Ibid.*

35. In an action for personal injuries alleged to have been caused by a defective scaffold or platform upon which plaintiff was working, the defense of assumption of risk is available to the defendant. *Ibid.*

36. The facts that plaintiff assisted other workmen in changing one joist in a scaffold and that he heard another employee advise the person nailing it to put in more spikes, to which the latter replied that it was strong enough, were not sufficient to charge plaintiff with assumption of the risk as a matter of law. *Ibid.*

37. Where such change was necessary to allow the performance of work with which the timbers of the original scaffold interfered, and was made in the presence and with the consent of defendant's foreman, the statutory duty to furnish a safe scaffold applied to the structure as changed. *Ibid.*

38. Such single alteration in the scaffold did not render applicable the rule relative to a place of work which is constantly changing during the progress of the work. *Ibid.*

*Contributory negligence.* See RAILROADS, 1–10.

39. The defense of contributory negligence has been taken away by ch. 599, Laws of 1913, as to actions arising after that act became effective, where four or more employees are engaged in a common employment. *Rosholt v. Worden-Allen Co.* 168

MAXIMS.

Expressio unius est exclusio alterius, 643.
Fraud vitiates everything, 368.
Interest reipublicæ ut sit finis litium, 368.
Judicia sunt tanquam juris dicta, et pro veritate accipiuntur, 368.
Nemo debet bis vexari pro una et eadam causa, 368.

Nemo tenetur seipsum accusare, 232–234.
Res ipsa loquitur, 71, 78.
Respondeat superior, 485, 487, 489.
There is no wrong without a remedy, 348, 367.

MEASURE OF DAMAGES. See DAMAGES, 3–16. MUNICIPAL CORPORATIONS, 21, 22.

MECHANICS' LIENS. See CONTRACTS, 12. TRIAL, 9, 10.

MEETINGS. See SCHOOLS AND SCHOOL DISTRICTS, 2.

MISDEMEANOR. See MUNICIPAL CORPORATIONS, 8–11.

MITIGATION OF DAMAGES. See DAMAGES, 10.

## MORTGAGES.

*Foreclosure: Receivers.*

1. After the plaintiff in an action to foreclose a first mortgage had applied for a receiver, and after notice of *lis pendens* had been filed, an action to foreclose a second mortgage was commenced without making said plaintiff a party, and thereafter judgment by default was taken in the second action and a receiver appointed therein, without notice to the plaintiff in the first action, to collect the rents and profits of the mortgaged premises. Said plaintiff, who was entitled to have the rents and profits applied on the first mortgage, made the receiver a defendant in the first action. *Held*, that the court had the right to remove such receiver and appoint another in his stead. *Schneider v. Miller*, 239

2. Such receiver having answered in the first action that he was indifferent whether he continued as receiver or not, and having appealed without leave of court from a judgment for plaintiff in that action, it is *held* that he has no substantial ground upon which to ask for a reversal of that judgment. *Ibid.*

*Same: Judgment for deficiency.*

3. Where the mortgaged property was owned jointly by husband and wife and the note secured was signed by both, and the mortgage was given to pay a prior mortgage on the same premises, it was proper in the judgment of foreclosure to provide for a deficiency judgment against the wife. *Schneider v. Miller*, 239

MOTION COSTS. See COSTS, 1.

## MUNICIPAL CORPORATIONS.

*Commission form of government: Effect on existing officers and boards: Vacancies.*

1. Under ch. 448, Laws of 1909, providing for the governing of cities by commissions, and declaring that upon the reorganization of a city under that act the council of three should "have all the powers and perform the duties had and exercised by the mayor and council and the several administrative and executive officers, boards and commissions of such city," the effect of the adoption of the act by a city was to put an end to an existing fire and police commission. *State ex rel. Bloomer v. Canavan*, 398

2. Ch. 387, Laws of 1911, which amended said act of 1909 so as to provide for the continued existence of boards and commissions created under laws theretofore in force in any city which should adopt the commission form of government, had the effect to create or restore a fire and police commission which had previously been abolished in such city, but not to reinstate in office the former members of such commission. *Ibid.*

3. The act of 1911 provided for the selection of one member of such board, in cities already organized under the commission form of government, by the city council from their own number at their first regular meeting after the act was passed, and it was the evident intent that the board should be organized and proceed to carry out its functions promptly after such act of 1911 was passed. *Ibid.*

4. Practically, in such a case, there were vacancies in the board to be filled as soon as the act of 1911 became effective, and as to the members other than the one to be chosen from the council the mayor had power to fill such vacancies, under sec. 959—40, Stats., which, not being inconsistent with the new scheme of government under the act of 1911, was continued in force by virtue of sec. 925*m*—303. *Ibid.*

5. The fact that the mayor and council did not act promptly in such case in naming the members of such board, did not invalidate their acts when done at a later period. *Ibid.*

6. Even if the terms for which members of such fire and police board were appointed were not legal, yet, the authority existing to make the appointments for as long a time as they were made, the appointees accepting and acting as such were at least *de facto* officers, and their action in trying charges against and removing a policeman was valid. *Ibid*

7. Even if said acts of 1909 and 1911 were unconstitutional there would still be a *de jure* office under the previously existing statute, and the former incumbents having ceased to act, the new appointees would be *de facto* officers just the same, with the power of removal. *Ibid.*

*Common council: Powers.* See INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS, 13, 23. PUBLIC UTILITIES, 15.

*Same: Ordinances: Delegation of legislative power: Penalty for act also misdemeanor by statute.* See MUNICIPAL CORPORATIONS, 23.

8. Although a statute makes an act a misdemeanor, a municipal ordinance enacted under proper legislative authority may also make it punishable by a fine or penalty collectible in a civil action. *Milwaukee v. Ruplinger,* 391

9. So *held* as to the keeping of a junk shop without license, made a misdemeanor by ch. 337, Laws of 1887, and also made punishable by fine by an ordinance of the city of Milwaukee enacted pursuant to its charter (sec. 3, subch. IV, ch. 184, Laws of 1874, as amended by ch. 74, Laws of 1891). *Ibid.*

10. The term "fine" or "punished by fine" in a city ordinance implies a mere forfeiture or penalty collectible by civil action in the name of the city; and in such action the city has the right to appeal from the result of the trial. *Ibid.*

11. A city ordinance providing for the licensing of junk shops and that all applications for licenses thereunder "shall be made to the mayor, who may grant or refuse to grant such license as to him may seem best for the good order of the city," was not invalid as a delegation of legislative or arbitrary power. It conferred upon the mayor administrative duties only, to be exercised in a reasonable and impartial manner, and gave him no authority to say whether the business of keeping junk shops should be permitted or not, or to discriminate between persons under the same or similar circumstances. *Little Chute v. Van Camp*, 136 Wis. 526, distinguished. *Ibid.*

*Officers: Police and fire commissioners: Eligibility: Constitutional law.*

12. In a statute (sec. 959—46*d*, Stats.: Laws of 1911, ch. 586) creating a board of fire and police commissioners in cities of the first class, a provision that not more than two of the five commissioners "shall at any time belong to the same political party" does not exclude any one from eligibility and does not render the law unconstitutional. *State ex rel. Kleinsteuber v. Kotecki*, 66

*Same: Right to fix salary for newly created office.*

13. A municipal ordinance creating a new office, passed after the time at which the common council is required by law to fix all salaries, may nevertheless fix the salary of the office so created. *State ex rel. Kleinsteuber v. Kotecki*, 66

*Property: Purchase of waterworks.* See PUBLIC UTILITIES.

*Public improvements: Streets: Sidewalks: Repair and relaying.*

14. In sec. 16, ch. VII, Milwaukee City Charter, which imposes upon the board of public works the duty "to cause the streets, alleys and sidewalks in the city to be kept in proper repair and in a cleanly and wholesome condition," the further provision empowering said board "to cause sidewalks to be repaired, or to be taken up and relaid with new materials, or with part new and part old materials," etc., refers only to walks which are out of repair. *Ricketson v. Milwaukee*, 327

15. In an action to restrain collection of a special assessment for constructing new sidewalks, allegations that the sidewalks which were taken up were "good, safe, and sufficient sidewalks, in repair and at proper grade and of required size, free from any danger to persons passing over the same," admitted by demurrer, show that the board of public works had no power under said sec. 16 to build the new walks. *Ibid.*

*Same: Special assessments: "Curbing and resurfacing."*

16. Where a special assessment for resurfacing a street is authorized by statute upon presentation of a certain petition, the complaint in an action to set aside such assessment as unauthorized and illegal should expressly negative the presentation of such a petition. *Hoefer v. Milwaukee*, 83

17. The words "or curbing or resurfacing of such street or avenue," added to sec. 959—35, Stats., by ch. 185, Laws of 1911, refer to any street or avenue in the cities there specified, and not merely to streets or avenues which have been improved with a permanent pavement having a concrete foundation; hence

under that statute any such street or avenue may be curbed or resurfaced and the expense, not exceeding the statutory limit, assessed against the abutting property. *Ibid.*

*Streets: Unlawful change of grade: Special assessments: Taking private property without compensation.*

18. An action to recover damages for an unlawful change of a street grade and to recover money paid upon an illegal assessment certificate issued thereon, is, under present statutes, in effect an action for a reassessment, and based upon such cause of action there can be no recovery for private property taken for public use without compensation, nor for the incumbering or blocking of streets by contractors. *Burnham v. Milwaukee*, 90

19. Construed liberally—as required by sec. 2649*a*, Stats. (Laws of 1911, ch. 354),—the complaint in an action against a city is *held* to state a cause of action for an unlawful taking by defendant, in changing the grade of a street, of private property of plaintiff without resorting to condemnation proceedings or making compensation therefor, such property being a part of an area or basement lying outside of the limits of the street. *Ibid.*

20. The same complaint is *held* also to state a cause of action for damages and for a reassessment, it being alleged that the established grade of the street was changed and that no assessment of benefits and damages sustained by the owners of the property adjacent and abutting upon the street was made prior to the letting of the contract for the work as required by law (Milwaukee City Charter, ch. VII, secs. 6–10),—although it also shows that such an assessment was made at some later time. *Ibid.*

21. If plaintiff recovers in such action for unlawful taking of his private property, such damages cannot be duplicated under the cause of action last above mentioned. *Ibid.*

22. If, however, the part which was taken of the basement or excavated area was under the sidewalk and in the street, plaintiff cannot recover such damages as if it were his private property, but it is to be treated as any other convenience of a temporary character which he was rightfully enjoying and had the right to enjoy until the city lawfully terminated such right, and for its loss by an unlawful change of grade he is entitled to recover the diminution in value of his property with its lawful appurtenances, after due allowance made for benefits. *Ibid.*

23. Under the Milwaukee city charter, no petition of abutting property owners need be presented to the common council prior to the enactment of an ordinance changing the established grade of a street. The provisions of sec. 6, ch. VII, of the charter relate to a petition at a later stage of the proceedings. *Ibid.*

24. Although municipal contracts for the construction of a bridge and tunnel each prescribe a time for completion of the work and a per diem penalty for delay, the mere omission of the city to enforce such penalty or compel the contractors to complete the work, even though it results in injury to an abutting property owner by permitting the street to be incumbered, preventing his use of the street and bridge, and impairing or preventing access to his premises for a longer time than necessary,

will not render the city liable in damages to such property owner. *Ibid.*

*Torts: Defective sidewalk: Duty of abutting owner.*

25. It is the duty of a city to maintain its sidewalks in a suitable condition for public travel; but it is the duty of the abutting owners to act reasonably to prevent and remedy a condition rendering the walk unsuitable for use. *Adlington v. Viroqua,* 472

26. If an abutting owner by his own fault renders a sidewalk defective, he is liable for a resulting injury regardless of the concurrent liability of the city. *Ibid.*

27. Ordinary care for the safety of others is not consistent with such conduct as that of a person accumulating into a body the water falling upon his premises and discharging the same in such a manner that the natural and probable result will be to render the premises receiving the flow unsuitable for their ordinary use. *Ibid.*

28. Where the owners of a building discharged water from the roof thereof through a conductor pipe into an alley near a sidewalk, and a culvert under the walk, designed to afford a channel for such water, had been obstructed for some time, so that as a natural and probable consequence the water flowed upon the walk, causing ice to form thereon and render the walk unsafe, a jury was warranted in finding that said owners acted unreasonably and hence negligently in thus discharging the water, even if it be conceded that it was the duty of the city to keep the culvert clear. *Hausmann v. Madison,* 85 Wis. 187, distinguished. *Ibid.*

29. But, under sub. 7, sec. 925—205, Stats., imposing upon abutting lotowners the duty of keeping sidewalks in repair, it was the duty of the owners of the premises, primarily, to repair the obstructed condition of the culvert. *Ibid.*

30. The duty to repair being imposed upon the owners, the fault which rendered the manner of discharging the water from the premises unreasonable and negligent was the fault of the owners, even though the premises were at the time occupied by a tenant, especially since the conditions in question existed long before the premises were leased. *Ibid.*

*Same: Street cleaning: Negligence of driver of dump wagon.*

31. The care and maintenance of the highways in a city is a governmental duty; and the city is not liable *respondeat superior* for negligence of an employee or licensee in operating a city dump wagon which is being used for street-cleaning purposes. *Bruhnke v. La Crosse,* 485

32. The mere fact that a dump wagon owned and operated by a city for street-cleaning purposes was attractive to children would not make its use on the streets unlawful or its presence a nuisance. The city is not liable, therefore, for injuries to a child who followed the wagon and, just as the driver dumped the load, came in contact with the chains constituting a part of the dumping device. *Kelly v. Southern Wis. R. Co.* 152 Wis. 328, distinguished. *Ibid.*

*Public debt.* See PUBLIC UTILITIES, 1, 2, 6–15.

NEGLIGENCE.
Acts and omissions constituting negligence. See ABATEMENT AND REVIVAL, 1, 2. DAMAGES, 1, 2, 13–16. ELECTRICITY. FIRES. HIGHWAYS, 4. LANDLORD AND TENANT, 7, 8. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 25–32. RAILROADS. TRIAL, 1, 5, 6. WITNESSES, 6.
Proximate cause. See FIRES, 2. LANDLORD AND TENANT, 8. MASTER AND SERVANT, 4, 9. RAILROADS, 11.
Imputed negligence. See RAILROADS, 9, 10.
Contributory negligence. See APPEAL, 24. ELECTRICITY. FIRES. HIGHWAYS, 4. MASTER AND SERVANT, 8, 10, 17, 19, 31, 33, 39. RAILROADS, 1–10.

NEW TRIAL.

See APPEAL, 4, 5, 17, 22. COSTS, 1. DAMAGES, 9, 12.

1. An order granting a new trial on the ground that the verdict is contrary to the evidence is a discretionary one and will not be disturbed upon appeal unless it clearly appears to have been an abuse of judicial authority. *Fred Miller B. Co. v. Milwaukee,* 81
2. The evidence in this case showing that plaintiff was entitled to substantial damages for breach of contract, the trial court properly granted a new trial after the jury—as they were told they might do by an erroneous charge of the court—returned a verdict for nominal damages only. *Cawker v. Trimmel,* 108
3. Jurors having, during their deliberations, obtained a dictionary and read therein a definition of the word "proximate" at variance with the definition correctly given by the trial court, an order granting a new trial because of such irregularity is *held* not manifestly wrong, and is affirmed, although eleven of the jurors (the other not being found) made affidavits that the verdict was not influenced by the use of the dictionary. *Banaszek v. F. Mayer B. & S. Co.* 127

[4. Whether such affidavits of the jurors were properly received in evidence to support the verdict, not determined.] *Ibid.*

5. Under sub. 3, sec. 28, ch. 549, Laws of 1909, upon appeal from the civil court of Milwaukee county, if a new trial be ordered it should be had in the circuit court. The statute does not provide for the remanding of a case to the civil court for a new trial. *Pennsylvania C. & S. Co. v. Schmidt,* 242

NONSUIT. See MASTER AND SERVANT, 7, 11.

NOTICE of entry of order: Service. See APPEAL, 10.

NUISANCES. See MUNICIPAL CORPORATIONS, 32.

OFFER OF JUDGMENT. See PLEADING, 8.

OFFICERS.

*De facto and de jure.* See MUNICIPAL CORPORATIONS, 6, 7. OFFICERS, 2. SCHOOLS AND SCHOOL DISTRICTS, 4.

*Constitutional officers.* See CONSTITUTIONAL LAW, 8.

*Eligibility and qualifications.* See CONSTITUTIONAL LAW, 8, 9. MUNICIPAL CORPORATIONS, 12.

*Tenure of office.* See MUNICIPAL CORPORATIONS, 2–7.

*Same: Resignation without acceptance: Effect.*

1. Where the term of an officer is during good behavior, subject to removal for cause, and there is no provision that he shall hold until his successor qualifies, the office becomes vacant under sec. 962, Stats., upon his resignation, without an acceptance thereof. *State ex rel. Kleinsteuber v. Kotecki,* 66

*Same: Vacancies.* See MUNICIPAL CORPORATIONS, 4–7.

*Same: Right to salary: Receipt of pension.*

2. Where acceptance of the resignation of such an officer is refused and he continues to perform the duties of the office, he becomes a *de facto* officer and is entitled to the salary of the office if there is no *de jure* officer claiming it. *State ex rel. Kleinsteuber v. Kotecki,* 66
3. Under ch. 347, Laws of 1913 (amending sec. 925—31c, Stats.), the fact that a city officer is receiving a pension from a fund held by the city does not debar him from drawing the salary of his office. *Ibid.*

*Compensation: Excessive fees: Error in allowance, how corrected.* See MUNICIPAL CORPORATIONS, 13.

4. The words "allowed by law" or "allowed by the laws of this state," in secs. 2955–2957, Stats., relate only to cases in which a definite sum is fixed by the statute or the laws of the state as compensation for a specific service. They do not apply to a case where the statute (sec. 3752, Stats.) provides that a justice of the peace may allow to the officer having charge of property seized on a warrant of replevin "such compensation for his trouble and expenses as shall be reasonable and just." *Kerwin v. Albrecht,* 599
5. Any error committed by the justice having jurisdiction of the subject in the allowance of compensation under sec. 3752, Stats., should be corrected in the replevin action before the justice or on appeal; and no independent action can be maintained to correct such error. *Ibid.*

OFFICIAL BONDS. See LIMITATION OF ACTIONS, 1–12. SCHOOLS AND SCHOOL DISTRICTS, 3–6.

OPTION LAWS. See CONSTITUTIONAL LAW, 5–9.

ORDINANCES. See CONSTITUTIONAL LAW, 3. COUNTIES, 1. MUNICIPAL CORPORATIONS, 8–11, 23.

OSTEOPATHY. See HABEAS CORPUS, 2, 5. PHYSICIANS AND SURGEONS, 1.

PAROL CONTRACTS. See FRAUDS, STATUTE OF.

PARTIES. See ABATEMENT AND REVIVAL, 1, 2, 5. COURTS, 3. PARTNERSHIP.

## PARTITION.

*Who may maintain.* See WILLS, 5, 8.

1. Under sec. 3101, Stats., the estate or interest in lands which will entitle a person to maintain an action for partition must be presently vested in him. *Cashman v. Ross,* 558; *Greeney v. Greeney,* 621

*Investment of proceeds of sale.*

2. Sec. 3127, Stats., contemplates in a partition action a final judgment of distribution of the proceeds of the sale at the close of the litigation; and the statutes provide for the investment of the shares of absentees, infants, and tenants in dower only, but not for the investment of shares of adult parties to the suit who appear in court. *Greeney v. Greeney,* 621

PARTNERSHIP.

*Contract: Construction: Liability for unpaid capital: Receivers.*

1. A partnership agreement between W. and S. recited that W. had invested $6,700 and S. was to contribute $3,300, and provided that S. should have the option to pay the $3,300 in cash or to secure improvements to be made by some other person for the benefit of the partnership, which should count as so much paid toward his contribution to the capital. *Held* that, to entitle S. to credit for improvements made by a third person upon his procurement or request, they must be paid for by him or furnished without charge to the firm. *Torbe v. Strauss,* 518
2. Improvements procured by S. to be made by a brewing company to the value of $2,000, for which the firm gave a promissory note, pursuant to a contract with the brewing company whereby the firm agreed to buy of it 100 barrels of beer per year for a stated time, and the brewing company agreed, upon that condition being performed, to credit the firm with $220 a year on such note, did not entitle S. to a credit of $2,000 toward his contribution to the capital. *Ibid.*
3. An action to recover an unpaid balance of the amount to be contributed by S. to the capital was properly brought in the name of a receiver appointed in an action to dissolve the partnership and for an accounting and settlement of the partnership affairs. *Ibid.*
4. Where one S. agreed to go into partnership with W. in a certain business and to contribute a stated amount to the capital, but, when the articles were being drawn up, stated that for business reasons he preferred not to sign them, and procured his brother to sign the same in his place, judgment properly went against both brothers in an action by a receiver to recover the unpaid capital, S. being bound as the real party in interest and his brother as a party to the contract of copartnership. *Ibid.*
5. In an action by a receiver to recover capital stock which one partner had agreed but failed to put into the firm—consolidated with an action to dissolve the partnership and settle its business,—upon an appeal by said partner from a judgment against him the questions as to what amounts should be allowed to the receiver and to his attorney, and what should be done with any balance remaining after settlement of the partnership affairs and the expenses of the receivership, are not properly before the supreme court, but should be determined in the court below in the adjustment of the receiver's account. It may be observed, however, that the balance, if any, which remains after all partnership matters are settled and

all partners have contributed their portion of the capital stock should be divided between the partners in the proportion of the interest of each in the net assets of the firm. *Ibid.*

*Authority of one partner to bring action.* See JUDGMENT, 4.

PARTY WALLS. See CONTRACTS, 15–21.

PAYMENT. See TAXATION, 10, 11.

PENALTIES. See MUNICIPAL CORPORATIONS, 24.

PENSIONS. See OFFICERS, 3.

PERSONAL INJURIES. See ABATEMENT AND REVIVAL, 1, 2. DAMAGES, 1, 2, 13–16. ELECTRICITY. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 25–32. RAILROADS. TRIAL, 1, 5, 6. WITNESSES, 6.

PHYSICIANS AND SURGEONS.

*Licensing: Constitutional law.* See HABEAS CORPUS, 2, 5.

1. The legislature has power to require persons practicing osteopathy to obtain a license, and to enforce such requirement by fine and imprisonment for practicing without a license. *Arnold v. Schmidt,* 55

2. The fact that such a statute is limited to persons practicing for a fee does not render it invalid, that being a legitimate ground of classification. *Ibid.*

PLACE OF CONTRACT. See CONTRACTS, 3–5.

PLEADING.

*Complaint.* See LIMITATION OF ACTIONS, 12. MUNICIPAL CORPORATIONS, 16, 19, 20.

1. Where a complaint states but one cause of action, the nature of the action is to be determined by the predominant facts stated. *Burnham v. Milwaukee,* 90

2. In testing a complaint for sufficiency all facts expressly alleged and all reasonably inferable from the whole pleading as well, giving to the language thereof the most liberal construction in favor of the plaintiff which it will reasonably bear and without necessary reference to the prayer, are to be regarded as stated; the ultimate question being, does the pleading, viewed as indicated, show the rights of plaintiff to have been remediably invaded or a wrong in that regard to be remediably threatened. *Laun v. Kipp,* 347

3. The rule that fraud must be pleaded by a statement of the facts constituting the fraud and that an allegation that a particular act was fraudulent is not sufficiently precise and definite, is subordinate to the foregoing rule and the one that mere indefiniteness does not go to sufficiency. *Ibid.*

4. If the term "fraudulent" or "fraudulently" is used in a pleading in such a way as to state facts in legal effect, so that with its context the subsidiary facts are reasonably inferable, the charge of fraud is to be regarded as sufficiently pleaded as regards a general demurrer, though the pleading may be open to a motion to make more definite and certain. *Ibid.*

5. Previous decisions to the effect that to allege an act to have been fraudulently done does not tender an issue of fact for want of precision and definiteness, but is a mere conclusion

of law, must be restrained to the now recognized spirit of the Code requiring obvious matters of mixed law and fact, when pleaded in their legal effect, to be regarded as matter of fact, and all facts reasonably inferable from a pleading, resolving all reasonable doubts in favor of the pleader, to be deemed sufficiently stated, upon a challenge for insufficiency. *Ibid.*

*Same: Admissions.* See BROKERS, 2.

*Same: Bill of particulars.* See BROKERS, 2.

*Answer.* See JUDGMENT, 3.

6. A pleading which attempted to combine an answer with several demurrers to the complaint should have been stricken out by the trial court. *Burnham v. Milwaukee,* 90

*Same: Admissions.*

7. Where plaintiff's demand and his right to recover thereon were admitted by the answer, error in the admission of incompetent evidence to establish them was entirely immaterial and nonprejudicial. *Landauer v. Kasik,* 376

8. In an action to recover a balance of $2,414.28 alleged to be due upon the sale of goods of the value of $2,721.40, defendant answered admitting the sale but alleging that the goods were worth only $2,716.49 (which would leave a balance of $2,409.37 on the sale). In a counterclaim for $2,396.92, he admitted that he owed plaintiff "the balance between $2,409.37 and $2,396.92, or the sum of $12.95," and tendered judgment therefor. *Held,* that the admission in the answer was sufficient to warrant judgment for plaintiff thereon, and that the admission in the counterclaim was both a tender of judgment and an admission of the amount due. *Ibid.*

*Counterclaim.* See TRIAL, 3.

*Reply.* See JUDGMENT, 3.

*Demurrer.* See COURTS, 3. MUNICIPAL CORPORATIONS, 15. PLEADING, 4–6.

9. A demurrer will not lie to mere surplusage not attempted to be set forth as a separate cause of action, nor to a sentence nor to a part of a cause of action; but the plaintiff cannot avoid a demurrer to separate causes of action, if there are such, merely by joining them in one count of the complaint. *Burnham v. Milwaukee,* 90

*Amendment changing cause of action.*

10. Under sec. 2669*a*, Stats., it was proper to permit a complaint to be amended so as to change the action from one for money had and received to the statutory action (based upon the same transactions) provided for by secs. 2955–2957, Stats. *Kerwin v. Albrecht,* 599

PLEDGES.

In an action to foreclose an alleged pledge of corporate bonds, with which were delivered to the pledgee stock of the corporation to an equal amount, plaintiff testified that the transaction was a loan with collateral security, and defendant testified that it was an absolute sale of the bonds, with the stock given as a bonus. There were no other witnesses on the point.

*Held* that, although there were persuasive circumstances corroborating defendant's version, the finding of the trial court in plaintiff's favor was not so clearly against the preponderance of the evidence as to justify a reversal. *Carlson v. Dixon*, 63

POLICE AND FIRE COMMISSIONERS. See MUNICIPAL CORPORATIONS, 1–7, 12.

POLICE POWER. See HAWKERS AND PEDDLERS, 1. INSURANCE, 3.

PRESUMPTIONS. See APPEAL, 15, 16, 20. CONTRACTS, 3, 4. DAMAGES, 4. FRAUD, 3. MASTER AND SERVANT, 5, 34. RAILROADS, 6.

PRINCIPAL AND AGENT.

*Acts of agent in excess of authority: Disaffirmance.*

1. When an agent acts beyond or in excess of his authority, the principal will be bound by such act unless he disaffirms it within a reasonable time after knowledge thereof. *Francis H. Leggett & Co. v. West Salem C. Co.* 462

2. The evidence in this case is *held* insufficient to show disaffirmance by the defendant of the act of its agent in selling in forbidden territory. *Ibid.*

PRINCIPAL AND SURETY. See COUNTIES. SCHOOLS AND SCHOOL DISTRICTS, 5, 6.

PRINTED CASE. See APPEAL, 13.

PRIVILEGE. See CONTEMPT, 2–6. DISCOVERY, 5–7. LIBEL AND SLANDER, 3–6.

PROXIMATE CAUSE. See FIRES, 2. LANDLORD AND TENANT, 8. MASTER AND SERVANT, 4, 9. RAILROADS, 11.

PUBLIC POLICY. See EQUITY, 4–6.

PUBLIC UTILITIES.

*Purchase by municipality: Procedure: Statutes: Construction.*

1. Ch. 665, Laws of 1907 (secs. 927—11 to 927—19, Stats.), and the Public Utility Law (secs. 1797*m*—1 to 1797*m*—109, Stats.), do not, supplementing each other, furnish a single complete method for the acquiring of public utilities by municipalities, but each in itself provides a complete procedure for that purpose in the cases to which it applies; and each of said statutes is independent of the other. In a proceeding by a city to acquire a waterworks plant pursuant to the Public Utility Law, it was not necessary, therefore, to comply with the requirements of ch. 665, Laws of 1907. *Janes v. Racine*, 1

2. The primary purpose of said ch. 665, Laws of 1907, was to enable cities to construct or purchase plants by the issue of mortgage certificates, though bonds and cash were also included to make it more elastic; and it seems peculiarly adapted to situations where the amount to be raised can be definitely ascertained in advance. *Ibid.*

*Same: Submission to electors: Form of question and methods of voting.*

3. The common council of defendant city voted to submit to its electors "the question of purchasing the Racine Water Com-

pany plant," but did not otherwise direct the form of question or manner of submission. The city clerk prepared a notice of election in which the question to be voted upon read: "Shall the city of Racine purchase its waterworks?" and this was the form in fact submitted. *Held* that, whether or not the clerk had power to determine the form of the question, a resolution adopted by the common council after the election, reciting that the city had by a majority vote of the electors determined to buy the property of the Racine Water Company, amounted to a ratification of his act. *Janes v. Racine*, 1

4. The evidence in such case not disclosing that there was more than one waterworks plant in Racine, the voters were not misled and the question was properly submitted. *Ibid.*

5. It being entirely within the discretion of the legislature to grant or withhold from the electors of a municipality the right to vote on the subject of the purchase of waterworks, it might, in granting such right, attach to it the reasonable condition that the vote should be taken in the manner prescribed by law, namely, by voting machines such as are authorized by secs. 44—1 to 44—18, Stats.; and it is immaterial whether such method is or is not a vote "by ballot" as prescribed by sec. 3, art. III, Const. *Ibid.*

*Same: Compensation: Providing fund in advance: Limit of indebtedness: Issuance of bonds: Constitutional law.*

6. No fund need be provided beforehand to pay for property taken by a municipal corporation for public use, because the taxable property of the municipality constitutes a sufficient fund or pledge for the making of the just compensation contemplated by the constitution (art. I, sec. 13). *Janes v. Racine*, 1

7. The acquisition by a city of the property of a public utility operating under an indeterminate permit, pursuant to the Public Utility Law, is not a condemnation but a purchase under the terms and conditions prescribed by that act, as supplemented and safeguarded by the constitution. To this the public utility agrees, as it is competent to do, by acceptance of an indeterminate permit. *Ibid.*

8. A debt is not incurred within the meaning of sec. 3, art. XI, Const., until its amount is ascertainable, because until then it is impossible to apply the test required by the constitution, namely, the ratio between the indebtedness of the municipality and the last assessed valuation. *Crogster v. Bayfield Co.* 99 Wis. 1, distinguished. *Ibid.*

9. In the acquisition of an existing plant by a city under the Public Utility Law, no debt is incurred by the city, within the meaning of sec. 3, art. XI, Const., when the vote to purchase is taken, but only when the price and terms become fixed by the filing of the certificates of the railroad commission and the exclusive use of the property, and presumably the title, vest in the municipality. *Ibid.*

10. The affirmative vote by the electors of a city upon the question of purchasing waterworks which are being operated under an indeterminate permit does not immediately put an end to such permit or franchise. *Appleton W. W. Co. v. Railroad Commission*, 154 Wis. 121, explained. *Ibid.*

11. When the railroad commission files its certificate and the exclusive use of the plant is transferred to the city, if payment is not then made interest must be allowed in order that the purchase price shall constitute just compensation. *Ibid.*

12. Where a city proceeds under the Public Utility Law to acquire an existing plant, sec. 3, art. XI, Const., requires that it shall, before or at the time of doing so, provide for the collection of a direct annual tax to pay therefor; and it was not necessary that the statute should contain any specific direction on that subject. *Ibid.*

13. Under the Public Utility Law as it stands, it becomes the duty of the railroad commission, after it has determined the amount of the purchase price and the terms and conditions of the sale, to notify the municipality of the result of its action and to give it a reasonable time after such notice and before the certificate is filed to provide for the direct annual tax which the constitution prescribes. *Ibid.*

14. Upon such notice, it becomes the duty of the municipality within such reasonable time to comply with the constitutional provision. *Ibid.*

15. If, in view of the terms and conditions of sale imposed by the railroad commission, it becomes necessary for the municipality to issue bonds, it can do so without any further vote of the electors, since their vote to purchase the utility must be held to include a vote to raise money by the issuance of bonds if that method be deemed necessary or expedient by the common council. *Ibid.*

*Same: Operation after vote to purchase: When title passes.*

16. Public health and convenience, as well as the statute, require that a public utility shall give adequate service, and such service must continue during the interval between the city's election to purchase and the time when the transaction is finally concluded by the filing of the certificate by the railroad commission. No estoppel, therefore, against the city to consummate the proceedings arises from the fact that it orders extensions of the utility plant after voting to purchase it. *Janes v. Racine,* 1

17. Up to the time the certificate of the railroad commission is filed, the plant which a city proposes to purchase is the property of the public utility, and the city must pay for it as it exists at the time it is turned over. *Ibid.*

*Indeterminate permit.* See PUBLIC UTILITIES, 7, 10.

PUNITORY DAMAGES. See DAMAGES, 10.

RAILROAD COMMISSION. See PUBLIC UTILITIES, 11, 13, 15, 17.

## RAILROADS.

*Construction.* See CONTRACTS, 7–12.

*Operation: Injuries to employees: Comparative negligence.*

1. Sec. 1816, Stats., does not require the finding of the jury upon the question of comparative negligence to be in any particular form of words: any finding which, in the light of the instructions given and the other findings, fairly shows that the jury

definitely passed upon the matter, is sufficient. *Tidmarsh v. C., M. & St. P. R. Co.* 149 Wis. 590, explained. *Panoff v. Chicago, M. & St. P. R. Co.* 99

2. Thus, where the jury specifically found actionable negligence of the railroad company proximately contributing to the injury, and also contributory negligence on the part of plaintiff, an affirmative answer to the question, "If you find that mutual fault of the defendant and plaintiff was the proximate cause of the injury, was the fault of the defendant greater?" was sufficient, where the jury were instructed that in answering that question they were "to determine whose fault was the greater contributing cause of the injury; the fault of the plaintiff or that of the defendant." *Ibid.*

*Same: Contributory negligence: Assumption of risk.*

3. Plaintiff was engaged in moving cars, with the aid of horses, upon a switch track. While he was standing at the front end of a car, with one foot over the rail, attempting to loosen a brake shoe, other cars were switched by defendant against the rear of that car and he was run over and injured. The evidence, showing among other things that the day was bright, that the cars were being switched up grade, and that a fellow-servant at the rear of the car uttered a warning to another standing near, which plaintiff might have heard, is *held* to sustain a finding by the jury of contributory negligence. *Sommerfeld v. Chicago, M. & St. P. R. Co.* 102

4. In an action against a railway company for injuries sustained by an employee of a brewing company while moving cars upon a switch track in the yards of the brewing company, it was proper to receive in evidence the agreement between the brewing company and the railway company under which the switching was being done; and in any event it could not have prejudiced plaintiff, who was found guilty of contributory negligence. *Ibid.*

5. Where the relation of master and servant did not exist between the parties to an action for personal injuries, an instruction upon the subject of assumption of risk, if error, cannot be regarded as prejudicial error, where there was no evidence tending to show that plaintiff assumed the risk which caused his injury. *Ibid.*

6. Where there is other evidence in the case to support a finding of contributory negligence, it will not be presumed to have been based upon a point, such as assumption of risk, which had no support in the evidence. *Ibid.*

7. Where plaintiff was injured by defendant's negligence in backing cars without any warning against the one at which he was working, and the evidence on both sides was to the effect that on former occasions warning had always been given, while defendant's evidence was also to the effect that warning was given at the time in question, there could not have been an assumption of that risk. *Ibid.*

8. An instruction in such case to the effect that it was plaintiff's duty to exercise ordinary care to keep himself out of danger and to listen for signals that cars were approaching, was appropriate and substantially correct. *Ibid.*

9. The doctrine of imputed negligence does not go to the extent of charging one employee with negligence because his fellow-servant was negligent. *Ibid.*

10. Where the jury found plaintiff guilty of contributory negligence, but this court is unable to determine whether or not such finding was based upon the negligence of a fellow-servant, of which there was some evidence and which the court erroneously instructed the jury they might impute to the plaintiff, such error must be deemed prejudicial. *Ibid.*

*Same: Injuries to persons at street crossing: Proximate cause.*

11. Where a child fell between the rails at the crossing of a railway track and a sidewalk, evidence of a defective condition of the crossing efficient to cause such a fall would warrant an inference that the fall was caused by such condition; and where a woman attempted to rescue the child and succeeded in throwing it from the track, but in so doing fell in front of an approaching train and was injured, the same considerations would justify a finding that the defective condition of the crossing was the proximate cause of the injury. *Cooper v. Chicago & N. W. R. Co.* 614

*Same: Fires negligently set.* See FIRES.

RATIFICATION. See JUDGMENT, 2. PRINCIPAL AND AGENT. PUBLIC UTILITIES, 3.

REAL-ESTATE AGENTS. See BROKERS, 1, 2.

REAL PARTY IN INTEREST. See PARTNERSHIP, 4.

REAL PROPERTY. See BROKERS, 1, 2. CONTRACTS, 7–12, 14–21, 23–27. COURTS, 3. EJECTMENT. ESTOPPEL. JOINT TENANCY. PARTITION. TAXATION, 4–8. TAX TITLES. VENDOR AND PURCHASER. WILLS, 5–9.

REASSESSMENT. See MUNICIPAL CORPORATIONS, 18–20. TAXATION, 9.

RECEIVERS. See MORTGAGES, 1, 2. PARTNERSHIP, 3–5.

REFERENDUM. See COUNTIES, 1, 3.

REMAINDERS. See WILLS, 5–9.

REPAIRS. See MUNICIPAL CORPORATIONS, 14, 15, 28–30.

REPLEVIN. See CONVERSION.

REPLY. See JUDGMENT, 3.

REQUESTS FOR INSTRUCTIONS. See APPEAL, 25. MASTER AND SERVANT, 23.

RESIGNATION. See OFFICERS, 1, 2.

RES IPSA LOQUITUR. See MASTER AND SERVANT, 1.

RES JUDICATA. See JUDGMENT, 1, 2.

RESOLUTIONS. See CONSTITUTIONAL LAW, 2, 3. COUNTIES.

RESULTING TRUSTS. See JOINT TENANCY, 2–5.

REVIVAL OF ACTIONS. See ABATEMENT AND REVIVAL.

REVOCATION OF LICENSE. See INTOXICATING LIQUORS.

RULES. See MASTER AND SERVANT, 29.

SALES OF LAND. See VENDOR AND PURCHASER.

SCAFFOLDS. See MASTER AND SERVANT, 32, 35–38.

SCHOOLS AND SCHOOL DISTRICTS.

*Primary department: Contract of teacher.*

1. The primary department of a public school does not include the sixth, seventh, and eighth grades, and one who contracts to teach the primary department cannot be required to teach said grades in their grade work, even though the classes be sent to the primary room. *Butler v. Joint School Dist.* 626

*School board: Meetings.*

2. When all the members of a school board are present, official action may be taken although the meeting be not formally called or the action formally recorded in the minutes. *Butler v. Joint School Dist.* 626

*Treasurer's bond: Breach: Action, in whose name prosecuted: Liability of sureties.*

3. An action for breach of the bond of a school district treasurer should be prosecuted in the name of the district; but the fact that the action was brought in the name of the district board does not constitute prejudicial error. *Board of School Directors v. Kuhnke,* 343

4. A school district treasurer who duly qualified as such for one term, and upon re-election failed to give a new bond but acted as treasurer thereafter until his death, continued to be treasurer *de facto* and *de jure* during that time, under the provision in sec. 443, Stats. 1911, that the treasurer shall hold his office until his successor be elected or appointed and qualified. *Ibid.*

5. The sureties on such treasurer's bond for his first term were, however, held only until the expiration of that term and for such further time as was reasonably necessary for the election and qualification of his successor. *Ibid.*

6. Where, at the end of his first term, such treasurer had in his hands a certain amount of school moneys, there was no breach of his bond by reason of his failure to pay over that amount to some other person, since he himself was entitled to hold it until his successor qualified; and where he thereafter, while continuing to act as treasurer, rightfully paid out a much larger amount of school moneys, there was no breach for which the sureties on the bond for his first term were liable, although at his death there was a shortage in the funds in his hands. *Ibid.*

SEALS. See LIMITATION OF ACTIONS, 1.

SELF-INCRIMINATION. See CONTEMPT, 3–6.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 14, 15, 25–30.

SLANDER. See LIBEL AND SLANDER.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS, 15–24. TAXATION, 9.

SPECIAL PROCEEDINGS. See APPEAL, 5. CONTEMPT, 1.

SPECIAL VERDICT. See APPEAL, 4. MASTER AND SERVANT, 27, 30, 32, 34. TRIAL, 1–6.

STATUTE OF FRAUDS. See CONTRACTS, 4, 5. FRAUDS, STATUTE OF. VENDOR AND PURCHASER, 2.

## STATUTES.

*Constitutionality.* See CONSTITUTIONAL LAW.

*Construction.* See ABATEMENT AND REVIVAL, 1, 2, 5. APPEAL, 10, 28. CARRIERS. CONSTITUTIONAL LAW, 1–6, 9. CONTEMPT, 1, 2, 4. CONTRACTS, 4. COSTS. COUNTIES, 1. DISCOVERY, 1, 4, 6, 7, 11–13. FRAUDS, STATUTE OF, 2, 4. HABEAS CORPUS, 2, 3, 5. HAWKERS AND PEDDLERS, 1. HIGHWAYS, 2. INSURANCE, 1, 4. JOINT TENANCY, 2, 3. LIMITATION OF ACTIONS, 2–4, 6. MASTER AND SERVANT, 7, 8, 11, 15, 34, 39. MUNICIPAL CORPORATIONS, 1–4, 7, 9, 12, 14, 15, 17, 19, 20, 23, 29. NEW TRIAL, 5. OFFICERS, 3, 4. PARTITION. PLEADING, 10. PUBLIC UTILITIES, 1, 2, 5–9, 12, 13. RAILROADS, 1. SCHOOLS AND SCHOOL DISTRICTS, 4. TAXATION, 1–6, 8, 9. TAX TITLES, 2, 3. TRIAL, 2, 7. WITNESSES, 4.

In the construction of statutes, the subject of the legislation, the context, the associated words, and the mischiefs which the particular statute was intended to guard against, as well as the consequences of a particular interpretation, all factors in arriving at correct results, make mere judicial definitions of particular words used in a different connection and with reference to a different subject of quite subordinate, if of any, importance as aids. *Oconto County v. MacAllister,* 286

*Mandatory or directory?* See TRIAL, 7.

STREETS. See MUNICIPAL CORPORATIONS, 14–32. RAILROADS, 11.

SUPREME COURT. See APPEAL, 1–27.

SURPLUSAGE. See PLEADING, 9.

SURVIVORSHIP. See JOINT TENANCY.

## TAXATION.

*Income tax: Corporations: Review of assessment: Illegal taxes: Remedies.*

1. Sec. 1087*m*—13, Stats., does not refer to an action to recover taxes illegally levied, but to a review before the tax commission of its preliminary decision as to the amount of income upon which the corporation must pay an income tax; being in effect the same right as the right "to appear and be heard" given to certain corporations, in respect to the assessment of their properties, by secs. 1215—10, 1218—11, 1222—11, 1222*bb*, 1222—53, 1222—63, 1222—73, Stats. *Montreal M. Co. v. State,* 245
2. The time of the hearing under said sec. 1087*m*—13, Stats., is a matter of detail for which the commission may provide. *Ibid.*
3. *It seems* that the remedies as to the cancellation of illegal taxes and the refund of moneys paid thereon which, by ch. 27, Laws of 1913 (sub. 4, sec. 1087*m*—22, Stats. 1913), are preserved to all persons paying income taxes, include the remedies given by sec. 1164, Stats. (Laws of 1913, ch. 478), by way of the filing of a claim and the commencement of an action against the town, city, or village to which the illegal taxes are paid. *Ibid.*

*Occupation tax.* See HAWKERS AND PEDDLERS, 2.

*Assessment: Bank stock: Deduction of value of realty: Rebuilding of banking house.*

4. In view of the option given by sec. 1057*b*, Stats. 1911, to a bank to pay the taxes on all shares of its stock and charge the sum

paid to expenses, any illegal and substantial increase of taxes which tends to prevent the bank from making its shares attractive in that manner is a special and direct injury to the interests of the bank itself, which qualifies it to maintain an action of *certiorari* to test the validity of the assessment. *State ex rel. Second Ward Sav. Bank v. Leuch,* 493

5. Whether sec. 1061, Stats. 1911, applies to the assessment of bank stock at all is *doubted.* If it is applicable, its requirements are substantially complied with by the appearance and examination of the bank officers, the bank being considered the agent of the stockholders so far as the assessment is concerned. *Ibid.*

6. Construing it fairly and reasonably according to the manifest intent to avoid double taxation, the provision in sec. 1057, Stats. 1911, that if "the building in which" a "bank maintains its offices and transacts its business be owned by such bank, the assessed value thereof, including the land on which it is located, if owned by such bank, shall be deducted from the total value of" the shares of stock, includes the branch offices of the bank as well as its main banking house. *Ibid.*

7. Although a bank is rebuilding its main banking house and is temporarily occupying rented quarters, it nevertheless "maintains its offices and transacts its business" in the main banking house, within the meaning of the statute. *Ibid.*

*Same: Leasehold interest.*

8. Land held by a bank under lease, even though it be a long-time lease—in this case for ninety-nine years—with privilege of indefinite renewal, is not "owned by such bank," within the meaning of sec. 1057, Stats. 1911. *State ex rel. Marshall & Ilsley Bank v. Leuch,* 500

*Levy.* See PUBLIC UTILITIES, 12–14.

*Action to set aside assessment: Defenses: Payment to certificate holder.*

9. In an equitable action to set aside illegal special assessment certificates and obtain a reassessment, where plaintiff has paid the amount of the assessment to the city treasurer pursuant to sec. 1210*h*—1, Stats., the fact that said treasurer has paid the same over to the certificate holder as required by ch. 203, Laws of 1905, is not a defense. *Marine Co. v. Milwaukee,* 151 Wis. 239, distinguished. *Schmidt v. Milwaukee,* 44

*Voluntary payment of tax: Waiver of illegality.*

10. By the voluntary payment of a tax all right to bring action to recover it back or question its legality is waived. *State ex rel. Marshall & Ilsley Bank v. Leuch,* 499

11. In the absence of coercion, fraud, or mistake of fact, one cannot pay a tax without objection and afterwards demand his money back and maintain an action to recover it merely because he forgot at the time of payment that he proposed to contest the tax or because he did not know the legal effect of a voluntary payment. *Ibid.*

*Tax titles.* See TAX TITLES.

TAX COMMISSION. See TAXATION, 1, 2.

## TAX TITLES.

*Occupancy by original owner: Licensee: Deposit of taxes: Extension of time.*

1. A licensee having no estate or interest in land and yet in lawful occupancy thereof by permission of the owner occupies in the right of the owner as his agent for the purpose of occupation only. *Vicker v. Byrne,* 281
2. Open and obvious occupancy of a tract of land, under an oral license from the owner (the defendant), for the purpose of hauling logs in large quantities across it and banking them upon a creek running through the track, was "actual occupancy or possession of the defendant, his agent or tenant," within the meaning of sec. 1200, Stats. *Ibid.*
3. In an action by the grantee in a tax deed to bar the original owner, although defendant did not at the time of filing his answer make the deposit required by sec. 1200, Stats., the time within which such deposit should be made might, under sec. 2831, Stats., be extended by the court; but such extension should be conditioned upon payment of plaintiff's costs and disbursements up to that time, thus giving plaintiff an opportunity to accept the tender and discontinue his suit. *Ibid.*

TELEGRAMS. See CONTRACTS, 2.

TENDER. See VENDOR AND PURCHASER, 1.

TRADE SECRETS. See DISCOVERY, 7.

## TRIAL.

*Reception of evidence.* See BROKERS, 1, 2. DAMAGES, 1, 9–12. EVIDENCE, 4. HIGHWAYS, 3. JUDGMENT, 5, 6. LIBEL AND SLANDER, 1, 2. MASTER AND SERVANT, 2. PLEADING, 7. RAILROADS, 4. WITNESSES, 2.

*Questions for jury.* See LIBEL AND SLANDER, 7. MASTER AND SERVANT, 5, 6, 19, 21, 24.

*Same: Direction of verdict.* See MASTER AND SERVANT, 24.

*Instructions to jury.* See APPEAL, 26. EVIDENCE, 2. INSTRUCTIONS TO JURY. JUDGMENT, 4. LIBEL AND SLANDER, 4, 5. MASTER AND SERVANT, 10, 32, 33. RAILROADS, 2, 5, 8. TRIAL, 3, 5, 6.

*Same: Requests for instructions.* See APPEAL, 25. MASTER AND SERVANT, 23.

*Special verdict.* See APPEAL, 4. MASTER AND SERVANT, 27, 30, 32, 34.

1. With reference to a question in the special verdict in an action for injuries to a servant, as to whether the rollers on a machine were securely guarded, the court instructed the jury that they should answer the question "No" if they found that the rollers were not securely guarded "and the plaintiff's negligence did not proximately contribute to the injury." *Held,* that it was error to add the clause above quoted. *Banaszek v. F. Mayer B. & S. Co.* 127
2. Where no questions are proposed for a special verdict other than those submitted, if there is anything lacking in the verdict it must, under sec. 2858*m*, Stats., be considered as supplied by the judgment. *Dreblow v. Albert,* 189

3. In a counterclaim defendant alleged that he worked for plaintiff for a year at a salary of $4,000, of which a part remained unpaid. There was evidence tending to show that defendant was to receive that salary, but plaintiff's evidence tended to show that the salary was to be $4,000 only in case the commissions on sales made by defendant amounted to that sum, which they did not. Unless defendant was to receive a salary of $4,000 independent of commissions, he showed no right to recover. As to a question in the special verdict, "Was the agreement between the parties . . . for a straight salary of $4,000, not dependent upon a commission?" the court charged that if the jury were satisfied that the parties agreed that "defendant should receive a straight salary of $4,000, not dependent upon the amount of goods to be sold by him, that is, upon a commission," the question should be answered Yes, otherwise it must be answered No. *Held*, that in the light of the evidence and the charge a negative answer by the jury was a sufficiently definite finding and negatived the right of the defendant to recover on his counterclaim. *Landauer v. Kasik*, 376

4. The effect of an answer in a special verdict must be determined in the light of the instructions given in connection with the question, and it may be broader than the mere wording of the question would imply. *Murray v. Paine L. Co.* 409

5. The inclusion in the special verdict of a question as to whether the ground boss notified plaintiff before the accident that the upper part of the wall in question had separated from the roof of the drift, answered by the court "No," was not prejudicial error, especially since no different form of questions was requested and no objection made to the form of the special verdict submitted. *Dolphin v. Peacock M. Co.* 439

6. A special verdict which is framed upon the assumption that one material controverted question will be answered favorably to the plaintiff, though in bad form, was not prejudicially erroneous where the court specially charged the jury that there was no intention to intimate how such question should be answered. *Ibid.*

*Trial by the court: Oral judgment before written decision filed: Directory statutes.*

7. Sec. 2863, Stats., so far as it provides for the filing of a written decision by the court embodying its findings of fact and conclusions of law before judgment is entered, is directory only, and a valid judgment may be pronounced orally, in an action tried by the court, before any written findings and conclusions are made and filed. *Wallis v. First Nat. Bank*, 533

8. An oral statement by the trial court in this case, announcing its conclusion as to the relief to which plaintiff was entitled, is *held* to have constituted a pronouncement of a judgment, rather than a mere expression of opinion as to how the case should be decided; and an injunctional order previously issued was thereby modified in accordance with such conclusion. *Ibid.*

*Same: Findings: Sufficiency.*

9. In an action to foreclose a mechanic's lien, where the complaint alleged that plaintiff was prevented from full perform-

ance by acts of the defendant, a finding that plaintiff failed to complete his contract, without any determination as to whether defendant was responsible for such failure, was defective. *Whalen v. Eagle L. P. Co.* 26

10. Upon an appeal in such case from a judgment for plaintiff it becomes necessary for the supreme court to examine the evidence to ascertain whether the judgment is clearly supported by a preponderance thereof, and, if not so supported, to determine whether the preponderance is so clearly the other way that judgment for the defendant should be ordered or whether there should be a new trial. *Ibid.*

*Same: Value.*

11. Where there is a wide discrepancy between the testimony of the witnesses for the respective parties as to the value of property, the court is not bound to accept the valuation of any witness but may find the value at some intermediate figure. *Schacht v. Oriental S. & T. Co.* 121

TRUSTS AND TRUSTEES.

*Constructive trusts.*

1. Where one person has money of another and without the latter's consent invests it in property, taking the title in his own name, such property is impressed with a trust, and the money so fraudulently used can be recovered out of it, provided it can be clearly traced into it and the rights of other persons who have dealt with the property in good faith and without fault will not be prejudiced. *Wisdom v. Wisdom,* 434

*Resulting trusts.* See JOINT TENANCY, 2–5.

*Duties and obligations.*

2. Where a person occupies trust relations to another it is his duty to speak whenever the interests of such other would otherwise be prejudiced; he cannot legally or equitably, remain silent and secure to himself an advantage over such other. *Laun v. Kipp,* 347

3. In case of a person sustaining the relation of trustee to another, he owes to such other the duty of making a full disclosure of all matters appertaining to the trust, and neglect to do so to such other's injury, knowing or having good reason to believe that silence will so result, is a fraudulent act and the duty exists independently of inquiry in judicial proceedings, and failure of the trustee in that regard, persisted in in judicial proceedings to the prejudice of such other and advantage to himself, may be regarded as fraud extrinsic under the rule in *U. S. v. Throckmorton,* 98 U. S. 61, as well as fraud intrinsic. *Ibid.*

*Accounting.* See COURTS, 2.

UNDUE INFLUENCE. See FRAUD.

UNFAIR TRADE. See DISCOVERY, 4–10.

UNGUARDED MACHINERY. See MASTER AND SERVANT, 7–10. TRIAL, 1.

USAGE AND CUSTOM. See CONTRACTS, 6.

VACANCY. See OFFICERS, 1. MUNICIPAL CORPORATIONS, 4–7.
VALUE. See CONTRACTS, 22, 23. TRIAL, 11. WITNESSES, 1, 2.

VENDOR AND PURCHASER OF LAND.

*Exchange of lands: Time essence of contract.*

1. In an agreement for the exchange of lands the provision "that all necessary papers in the transfer of the properties from each to the other . . . shall be ready for delivery and be delivered from each to the other on or before the 1st day of March, 1912," clearly indicates an intention by both parties that the deal should be fully closed on or before the date specified; and in an action to cancel the agreement, upon evidence that an extension of time asked for by defendant was refused by plaintiff and that on March 1st plaintiff notified the person with whom the parties had agreed to deposit the deeds in escrow, and who had plaintiff's deed, that if defendant wished to close the deal plaintiff would be at his home until midnight for that purpose, the trial court properly *held* that time was of the essence of the contract and that a tender of performance by defendant after March 1st was not sufficient. *James v. Knox,* 118

*Certainty of description of land: Statute of frauds.*

2. A land contract which does not specifically describe the land to be conveyed, but refers to it in such terms that by the aid of the facts and circumstances surrounding the parties at the time the court can with reasonable certainty determine the land which is to be conveyed, satisfies the statute of frauds in this regard and may be enforced. *Wis. Cent. R. Co. v. Schug,* 563

*Breach of contract.*

3. A contract to convey land is not breached by reason of the existence of a railroad right of way over it, if the right of way be either in actual use or so prepared for use that its existence and purpose are obvious and unmistakable. *Wis. Cent. R. Co. v. Schug,* 563

VESTED RIGHTS. See INSURANCE, 2–5. WILLS, 5–9.
VOLUNTARY PAYMENT. See TAXATION, 10, 11.
VOTING MACHINES. See PUBLIC UTILITIES, 5.
WAIVER. See INSURANCE, 7. TAXATION, 10.
WARNING SERVANT. See MASTER AND SERVANT, 4, 6, 24.
WASTE. See LANDLORD AND TENANT, 3.
WATERWORKS. See PUBLIC UTILITIES.

WILLS.

*Probate.* See APPEAL, 28, 29.

*Construction: Intention of testator: Uncertainty.*

1. The paramount rule in construing a will is that the intention of the testator should prevail so far as it can be read out of the language used to express it. *Will of Ehlers,* 46
2. Of two reasonable meanings, one which will render a will void in whole or in part for uncertainty and one which will not, the latter is to prevail. *Ibid.*

3. Ordinarily, the last clause of two which conflict is supreme; but this has no application where the effect would be to defeat the real intent. *Ibid.*

4. A will giving to testatrix's four stepchildren (named in the will and called "my children") "each an undivided one-fifth part of my estate," and to her five grandchildren, "each an undivided one-tenth part of my estate," the fractions named totaling thirteen tenths, is construed as giving one fifth of the estate to each of the stepchildren and one twenty-fifth to each of the grandchildren. *Ibid.*

*Same: Life estates: Vesting of remainders.*

5. A will by which the testator gave to his daughter a life estate in certain land, with remainder to her children, stated: "It is my intention that said property shall be divided at the death of my said daughter among all the children she may have at the time of her decease equally, and if any of said children shall die leaving issue prior to my said daughter's death, then that such issue shall take the share which would by the terms of this will have gone to such child had it lived." *Held*, that no interest vested in the remaindermen until the death of the life tenant. The life tenant being still living, the divorced wife of one of the remaindermen, to whom his interest in the land was given by a judgment of divorce, has, therefore, no interest in the land and cannot maintain an action for partition thereof. *Greeney v. Greeney*, 621

6. A plain direction, in a will devising land to a life tenant with remainder over, that no division or partition thereof shall be made until after the death of the life tenant, is valid and cannot be disregarded. *Ibid.*

*Same: Future division among a class.*

7. Where a testator devised lands to his wife during her life and directed that "after her death the said property to be divided equally between my children," no interest or estate vested in the remaindermen until the death of the life tenant. *Cashman v. Ross*, 558

8. In such case, where a daughter of the testator died before the widow, the devise to such daughter lapsed and her heir could not, after the death of the widow, maintain an action for partition against the surviving children of the testator. *Ibid.*

9. When property under a will is to be divided at a specified time in the future among a class, only those thereof who are alive at the time of division can take under the will in the absence of provisions to the contrary. *Ibid.*

WITNESSES.

*Competency.*

1. The owner of property, such as used household goods, which has no established market value is competent to testify to its value, particularly where such owner purchased the greater part of the goods. *Schacht v. Oriental S. & T. Co.* 121

2. The testimony of the owner of such goods that in fixing values she took into account the cost price of the articles, making such deduction as she thought proper to cover depreciation,

and that the values fixed by her were reasonable, was competent and tended to prove market value. *Allen v. C. & N. W. R. Co.* 145 Wis. 263, distinguished. *Ibid.*

*Same: Transactions with person since deceased.* See JUDGMENT, 5.

*Same: Husband and wife.*

3. A married woman, by direction of her husband, having written a letter to another, she is competent to prove the contents of such letter in case of that being material in a judicial investigation and satisfactory excuse being given for not producing the writing. *Boardman v. Lorentzen,* 566

*Examination.* See CONTEMPT, 1. DISCOVERY.

*Same: Cross-examination.* See DISCOVERY, 1.

*Same: Redirect examination.* See WITNESSES, 3.

*Same: Privilege of witness.* See CONTEMPT, 2–6. DISCOVERY, 5–7.

*Credibility.* See LIBEL AND SLANDER, 2. MASTER AND SERVANT, 21.

*Impeachment: Adverse witness: Prejudicial error.*

4. Where plaintiff has called and examined an employee of defendant as an adverse witness under sec. 4068, Stats., defendant has a right to re-examine such witness as to all matters tending to explain or qualify the testimony already given, though not as to new defensive matters, and may also ask the witness questions proper for the purpose of impeachment, upon stating that he does not intend thereafter to make the witness his own. *Adams v. Bucyrus Co.* 70

5. Where such right is refused, the question on appeal is whether the error was so materially harmful that, had it not occurred, the result might probably have been different. *Ibid.*

6. Where the witness so examined was the sole eye-witness of the accident in which plaintiff was injured, and immediately after such accident had made statements in writing which conflicted with his testimony in important particulars, and by the ruling of the court defendant is debarred from making use of such conflicting statements, the error should work a reversal. *Ibid.*

WORDS AND PHRASES.

*Actual occupancy or possession of defendant, his agent or tenant,* in statute. See TAX TITLES, 2.

*Allowed by law,* in statute. See OFFICERS, 4.

*Alterations,* in lease. See LANDLORD AND TENANT, 2.

*Ballot,* in constitution. See PUBLIC UTILITIES, 5.

*Curbing or resurfacing of such street or avenue,* in statute. See MUNICIPAL CORPORATIONS, 17.

*Damage done to the property rights or interests of another,* in statute. See ABATEMENT AND REVIVAL, 2.

*Damaged because thereof,* in statute. See LIMITATION OF ACTIONS, 8.

*Final order,* in statute. See CONTEMPT, 1.

*Fine,* in city ordinance. See MUNICIPAL CORPORATIONS, 10.

*Habitual.* See MASTER AND SERVANT, 25.

*Knowledge,* in statute. See LIMITATION OF ACTIONS, 5, 6.

*Maintains its offices and transacts its business,* in statute. See TAXATION, 7.

*Ordinance or resolution,* in statute. See COUNTIES, 1.

*Owned by such bank*, in statute. See TAXATION, 8.
*Peddler*, in statute. See HAWKERS AND PEDDLERS, 2.
*Person aggrieved*, in statute. See APPEAL, 28.
*Said premises*, in lease. See LANDLORD AND TENANT, 7.
*Sealed instrument*. See LIMITATION OF ACTIONS, 1.
*Special proceeding*, in statute. See APPEAL, 5. CONTEMPT, 1.
*Such street or avenue*, in statute. See MUNICIPAL CORPORATIONS, 17
*Value*. See CONTRACTS, 22, 23.

WORKMEN'S COMPENSATION ACT. See MASTER AND SERVANT, 11.

WRIT OF ERROR. See APPEAL, 1–3.